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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MARIE N. JACKSON,

Petitioner,

v.

CHUBB CORPORATION; CHUBB & SON, INC.; FEDERAL INSURANCE COMPANY; PAT HURLEY; MICHAEL MARINARO; GEORGE FAY; DORIS JOHNSON; MALCOLM BURTON; JEFF KING; KIM HOGREFE; BRIAN KIRSTIANSEN; SUSAN GAFFNEY; ED ELLIS; JIM GARDNER; JOHN DEGNAN; ED SPELL; SYLVESTER GREEN; RON GOLDSTEIN; AARON GOLDSTEIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the courts below misapplied applicable legal authorities to Marie Jackson's ("Jackson's") New Jersey Law Against Discrimination claims ("NJLAD") by concluding that she was not entitled to prove her NJLAD claims under a "continuing violation" theory, and applying a two year, rather than a six year statute of limitations to her NJLAD claims.

Whether by granting summary judgment to the defendants under the McDonnell Douglas/Burdine test against this Court and Third Circuit precedent, where pretext evidence had been introduced and there were material facts in dispute, the courts below misapplied this Court's ruling in Reeves.

Whether a per se violation of the discrimination laws may be established by an employer's failure to investigate claims of discrimination and take remedial action.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Marie N. Jackson, an individual citizen of the United States. Plaintiff has no corporate affiliations. Marie N. Jackson was the Plaintiff in the District Court, and the Appellant in the Third Circuit Court of Appeals.

Respondent

Chubb Corporation is not a party to this petition for Certiorari. Chubb Corporation was a Defendant in the District Court and a Respondent before the Third Circuit Court of Appeal.

Chubb & Son, Inc., Federal Insurance Company, Pat Hurley, Michael Marinaro, George Fay, Doris Johnson, Malcolm Burton, Jeff King, Kim Hogrefe, Brian Kirstiansen, Susan Gaffney, Ed Ellis, Jim Gardner, John Degnan, Ed Spell, Sylvester Green, Ron Goldstein and Aaron Goldstein. Respondents were Defendants in the District Court, and Respondents before the Third Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's unreported Opinions granting a dismissal of a portion of plaintiff's complaint and subsequent decision granting summary judgment to defendants on the remaining claims are set forth in the Appendix at App. 1a-22a and App. 23a-61a, respectively. The Court of Appeals unreported decision is set forth in the Appendix at App. 62a-65a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Opinion and Order on June 7, 2002. The within petition for a writ of certiorari was filed within 90 day thereof. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

N.J.S.A. 10:5-12. Unlawful employment practice or unlawful discrimination

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, genetic information, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment ...

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

New York Human Rights Law (N.Y. Exec. Law § 296 (McKinney 2000) Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race. Creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

STATEMENT OF THE CASE

The District Court had subject matter jurisdiction over this action, brought under the Age Discrimination in Employment Act (29 U.S.C. § 623(a)(1)), the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001), 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), and also had pendent jurisdiction over Ms. Jackson's claims pursuant to the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1) and the New York Human Rights Law (N.Y. Exec. Law § 290 (McKinney 2000)).

On or about June 17, 1998, the U.S. Equal Employment Opportunity Commission notified Plaintiff Jackson of her right to sue defendants Chubb and Sons and Chubb Corporation[1] for discrimination based upon race, color, age and sex. She instituted this action on or about September 15, 1998, to redress considerable damages brought about by defendants' discriminatory and retaliatory conduct.

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[1] All references to "Chubb" refer to Defendant Chubb and Sons, unless otherwise indicated.

Jackson is the victim of invidious discrimination based upon eight years of differential, disparaging treatment by which she was continuously passed over for promotions given to less qualified, younger employees and was ultimately terminated because she is a person of color (African-American), a woman, and over forty years of age. Her termination followed soon after she dared to complain about discrimination in a corporation whose managers and officers were primarily Caucasian males. Defendant Chubb responded to Jackson's discrimination claims by turning its back and effectively ignoring her charges; no meaningful investigation was ever performed, and no witness with relevant knowledge of her charges was ever interviewed by the company.

Jackson is a highly experienced and licensed New Jersey attorney. Others, without law degrees and lawyers with less credentials received promotional opportunities and greater recognition than Jackson, despite imperfect performances. Chubb hired Jackson with her five years large law firm experience, specializing in litigation on behalf of Fortune 500 clients. She joined Chubb's Directors and Officers ("D&O") group in February 1989 as a Home Office Claims Examiner. Jackson met all performance standards from 1989 to 1996, and in 1993 received an award for outstanding performance. She successfully managed cases for Chubb's insureds and litigation brought by Chubb itself, including "bad faith litigation."

In stark contrast, similarly situated younger Caucasian employees, working in either an actual or quasi-subordinate relationship to Jackson, with less experience, seniority and fewer credentials than Jackson, and with documented performance issues, received promotions denied to Jackson. These employees were neither subjected to the same criticisms as Jackson nor terminated. In contrast, Jackson's performance was so impeccable, that in 1994, defendant Kim Hogrefe recommended increasing Jackson's settlement authority to $2,000,000. Defendant John Degnan ("Degnan"), then defendant Chubb's CEO, refused to grant Jackson that settlement authority, and Jackson's career began spiraling downward. Once defendant Degnan tainted

Jackson's employment by allowing and promoting Chubb's unjustifiable treatment of her, other supervisors joined in, denying her career advancement.

Defendant Jeff King ("King") also tainted Jackson's employment by failing to recognize her accomplishments and treating her disparately compared to similarly situated employees. At the time he supervised Jackson, he uttered racial jokes; one supervising attorney testified that he heard those jokes. Three other African-American professionals, all claims examiners and attorneys, also testified to King's racial animus toward them. Wanda Akin ("Akin"), an attorney working for King, testified of complaining that a white male subordinate called her a "Fucking Black Bitch," yet King admonished her for provoking the racial slur through her alleged failure to properly manage this employee. King instructed Akin to downplay this racial incident and intentionally omit any reference to the term "Black" when reporting it.

Another claims examiner, Robert Covington ("Covington"), testified that when he reported to King, King marginalized his work, denied him raises and bonuses, unduly criticized him by nitpicking his work, denied him promotional opportunities and demeaned him. Jackson was the victim of the same pattern of discriminatory animus by King. Moreover, Robert Ashton ("Ashton"), a claims examiner working for King, sued Chubb for age discrimination, and Chris Adamchek ("Adamchek"), a Hispanic claims examiner, sued King and Chubb for national origin discrimination, additional evidence that Chubb engaged in a wholesale pattern of discriminatory behavior against its employees.

Jackson's career hit the proverbial glass ceiling when Chubb denied her the promotional opportunity of senior claims examiner in favor of four other individuals. Jackson had supervised those individuals in a technical capacity; they had less experience, were not attorneys and experienced performance problems, yet were not held accountable in the same way as Jackson. Jackson handled complex securities, bad faith and class action cases involving insureds at the highest ranks of a company. In contrast, other examiners handled "garden variety" personal injury (e.g., slip and fall)

insurance matters that were not as complex and did not create the type of liability for Chubb as the D&O cases.

In December 1996, Jackson transferred from the New York office to the New Jersey office, where she reported to defendant Susan Gaffney ("Gaffney"). Previously, Gaffney and another employee, Harry Wallace ("Wallace"), in Jackson's presence, mimicked voices designed to imitate a minstrel or "Amos 'N' Andy" show. Gaffney criticized Jackson's file-handling of previous matters, rather than on newly assigned cases, despite Chubb's audit guidelines to the contrary.

The ensuing criticisms of Jackson escalated in 1997 and her workload became enormous, with unreasonable deadlines and no support staff. Chubb seized on this bombardment by violating its own policies, granting Jackson only one 30-day period for improvement; other employees routinely and consistently received twice that amount of time. Moreover, the defendants placed Jackson on a plan for improvement in bad faith, because their true intention was to terminate Jackson for her discrimination complaints. Jackson was terminated on June 20, 1997.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the District Court improperly applied New Jersey State law and incorrectly held that under *Ali v. Rutgers*, 166 N.J. 280, 765 A.2d 714 (2000), the statute of limitation should be two years, rather than six years, for Jackson's NJLAD claim. The District Court also misread *Ali* and held, despite considerable law to the contrary, that the "continuing violation" theory for proving discrimination claims was inapplicable. Moreover, the District Court found, applying incorrect legal standards, that Jackson could not prove her continuing violation theory for her NJLAD claims when under the correct standards Jackson handily meets her burden.

Next, Jackson presented ample evidence demonstrating material factual issues, particularly showing that defendants' articulated business reasons were pretextual, thereby precluding summary judgment under *McDonnell Douglas/Burdine* and *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U.S. 133 (2000). The Court of Appeals did not fully consider either of the above issues and in any event misinterpreted clear New Jersey State law.

I. JACKSON'S CLAIMS UNDER THE NJLAD WERE ERRONEOUSLY DISMISSED

A six-year statute of limitation applies to Jackson's claims, whether or not she has alleged a continuing violation theory. The New Jersey state law cited by the District Court in its September 1, 2000 opinion does not support its contrary, erroneous conclusions. Thus, the Court below erred in granting dismissal of her claims, thus depriving Ms. Jackson of her property rights.

To clarify confusion as to the statute of limitations for NJLAD claims, in *Montells v. Haynes*, 133 N.J. 282, 627 A.2d 654 (1993), the Supreme Court of New Jersey held that a two-year statute of limitations applies to all NJLAD cases where the operative facts arose after the date of that decision, July 27, 1993. For cases arising on or before such date, a six-year statute of limitations applies. In *Montells*, the plaintiff filed her NJLAD action in May 1989, and on appeal raised the issue of the proper statute of limitations. The *Montells* Court found that an NJLAD injury was more like an "injury to the person" rather than an injury resulting from a breach of contract or other similar tortious conduct. 133 N.J. at 291, 627 A.2d at 658. The *Montells* Court held a two-year statute of limitations should apply to NJLAD actions, the same as for personal injury actions. 133 N.J. at 293-95, 627 A.2d at 659-61.

Montells next decided whether to apply this decision retrospectively or prospectively, and in doing so took note of considerable conflict in the law established by various courts on the applicable statute of limitations for NJLAD actions. While lower state courts and federal courts favored a six-year statute of limitations, this Court, under analogous federal statutes, preferred a two-year statute of limitations. Given that conflict:

> ... to restrict plaintiff to the two-year statute would be unfair. Our tradition is to confine a decision to prospective application when

> fairness and justice require. ... [T]he state of the law on the applicable statute of limitations under [NJ]LAD was sufficiently murky to justify plaintiff's reasonable reliance on the six-year period. In addition, the Legislature has directed a liberal reading of [NJ]LAD to afford the greatest protection to victims of discrimination. On balance, we conclude that our decision today should apply purely prospectively. Consequently, it applies only to cases in which the operative facts arise after the date of the decision. [(Citation omitted.)] Our decision does not apply to this case, pending cases, or to cases the operative facts of which arose before the date of this decision. *Montells*, 133 N.J. at 296-98, 627 A.2d at 661-62 (emphasis added.)

Therefore, in the matter at bar, where operative facts arose before July 27, 1993, the date of the *Montells* decision, a six-year, rather than a two-year statute of limitations, should apply.

In *Ali*, *supra*, the Court considered the appropriate statute of limitations for NJLAD claims with operative facts before and after the date of the *Montells* decision. The *Ali* court concluded, "... in cases in which the operative facts arise both before and after the date of *Montells*, plaintiffs must file their actions prior to the expiration of the six-year limitations period..." 166 N.J. at 282, 765 A.2d at 715. Under *Ali*, Jackson's claims are subject to a six-year statute of limitations, whether or not her claims are based upon a continuing violation theory.

The pattern of discrimination and retaliation in the present case began when Chubb hired Jackson in 1989. Defendant King subjected her to disparate treatment in the early 1990s when he held supervisory authority over Jackson from 1989 through 1995 and demonstrated overt discriminatory animus toward other African-Americans. Jackson provided several examples of how defendant King discriminated against other African-Americans before 1994,

and made racial jokes about minorities in that time period, as backdrop evidence of similar discriminatory conduct and animus directed at her. Also, claims examiners sued Chubb in the mid-1990s for age-based and national origin discrimination. These undisputed facts are operative facts that took place before and after 1994.

Since Jackson filed her initial complaint on September 15, 1998, Jackson is entitled, under *Ali*, to recover from September 15, 1992 for discriminatory and retaliatory actions of the defendants. Therefore, the District Court completely misapplied *Ali*, since the six-year statute of limitations applies whether any facts arose before the *Montells* decision. *Ali* applies whether or not Jackson's claims are based on a continuing violation theory. Jackson therefore respectfully requests that a writ of certiorari be granted so that the portion of the District Court's March 21, 2001 order depriving Ms. Jackson of her property rights can be reviewed on the merits and overturned.

The District Court, in its September 1, 2000 opinion, allegedly cites to *Ali* for the proposition that only if operative facts arose before the *Montells* decision could the statute of limitations under the NJLAD be expanded beyond two years. However, the *Ali* Court concluded,

> ... that plaintiff's cause of action did not accrue until sometime after the *Montells* decision. "When an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." *Wilson v. Wal-Mart Stores*, 158 N.J. 263, 271, 729 A.2d 1006 (1999). Nothing in this opinion is intended to alter our existing jurisprudence in that regard. *Ali*, 166 N.J. at 286 (emphasis added.)

Therefore, *Ali* only held that when considering a pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action stops. *Ali* explicitly acknowledged, "... certain patterns of allegedly

discriminatory conduct, beginning prior to July 27, 1993 [(the date of the *Montells* decision)] might extend far into the future." *Ali*, 166 N.J. at 286, 765 A.2d at 717. *Ali* therefore acknowledged and approved use of the continuing violation theory for proving NJLAD claim.

Moreover, the Appellate Division of the New Jersey Superior Court established certain standards for applying the continuing violation theory in NJLAD cases. Specifically,

> ...[t]he continuing violation theory is an equitable exception to the statute of limitations. *Bolinger v. Bell Atlantic*, 330 N.J. Super. 300, 306, 749 A.2d 857 (App. Div.), *cert. denied*, 165 N.J. 491, 758 A.2d 650 (2000). In *Ali v. Rutgers*, 166 N.J. 412 at 285, 765 A.2d 714, the Court noted that when an individual is subject to a continual and cumulative pattern of tortious conduct, the statute does not begin to run until the wrongful action ceases. *See also Wilson v. Wal-Mart Stores*, 158 N.J. 263, 272, 729 A.2d 1006 (1999). "'[O]nce a pattern of harassment has created a psychologically offensive work environment, the status quo of such continuous wrongful conduct can be based on the harasser's mere presence.'" *Id.* at 272-73, 729 A.2d 1006 (quoting *Bustamento v. Tucker*, 607 So.2d 532, 541 (La. 1992) (citations omitted)). Thus, when the acts are continuous, " 'on an almost daily basis, by the same actor, of the same nature, and the conduct becomes tortious and actionable because of its continuous, cumulative, and synergistic nature,' the statute of limitations period does not commence until the final act has occurred or the conduct has ceased." *Wilson v. Wal-Mart*, *supra*, 158 N.J. at 273, 729 A.2d 1006 (quoting *Bustamento v. Tucker*, *supra*, 607 So.2d at 542); *Bolinger v. Bell Atlantic*, *supra*, 330 N.J.Super. at 306, 749 A.2d 857.

> For discriminatory conduct to fit within the continuing violation doctrine, it must be intentional, pervasive, and regular and consist of more than the occurrence of isolated or sporadic acts. In addition, the plaintiff must demonstrate that at least one act of harassment or discrimination occurred within the filing period. *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754-56 (3d Cir. 1995); *Bolinger v. Bell Atlantic, supra*, 330 N.J.Super. at 307, 749 A.2d 857; *Beck v. Tribert*, 312 N.J.Super. 335, 346, 711 A.2d 951 (App. Div.), *cert. denied*, 156 N.J. 424, 719 A.2d 1022 (1998)...
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> To determine whether alleged violations are continuing, we must consider the subject matter of the violations (i.e. whether they are of the same type), their frequency and their permanence. *West v. Philadelphia Elec., supra*, 45 F.3d at 755 n. 9; *Bolinger v. Bell Atlantic, supra*, 330 N.J. Super. at 307, 749 A.2d 857. It is recognized that hostile work environment claims often, "straddle both sides of an artificial statutory cut-off date," *West v. Philadelphia Elec., supra*, 45 F.3d at 755 (citation omitted), and that to establish these claims, evidence is often relied on concerning events occurring long before the relevant filing periods. *Ibid.* The analysis should concentrate not on individual incidents, but on the overall scenario and the work atmosphere as a whole. *Id.* at 756.

Shepherd v. Hunterdon Developmental Center, 336 N.J. Super. 395, 411-13, 765 A.2d 227, 226-27 (App. Div. 2001), affirmed in part, reversed in part, and remanded, 2002 WL 1801184(N.J.), ___N.J.___, ___A.2d___ (2002).[2]

The District Court's September 1, 2000 analysis of Jackson's continuous violation theory of NJLAD recovery

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[2] *See also Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476 (3d Cir. 1997).

does not track this established precedent. Rather, the Court below found Jackson's failure to promote claims to be discrete events, placing her on notice that she had suffered discrimination; the Court found no ongoing pattern of discrimination. As a result, the Court erroneously concluded that her time to file her NJLAD claims began with her first failure to promote claim in 1994, and were therefore time-barred. This conclusion contravenes established precedent. The discrete nature of any event does not end the continuous violation analysis. Under the above-cited case law, the District Court was required to look at the overall pattern of discrimination and retaliation[3].

"There is a 'natural affinity' between the theory underlying hostile work environment claims and the continuing violation theory." *Rush*, 113 F.3d at 482 (citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995)). The defendants' discriminatory actions created a hostile working environment by consistently failing to recognize Jackson's accomplishments, denying her settlement authority, preventing her from advancing within the company, holding her to a higher or more critical standard of performance than others and subsequently terminating her. This was coupled with reprehensible racial jokes and other evidence of discrimination on the basis of race, nationality, and age. On a regular basis, Jackson suffered from a hostile work environment and a pattern of denied opportunities and disparate treatment, including, but not limited to:

(a) Defendant King supervised Jackson from 1989 through 1995. During that time, King was known to have uttered racial jokes; three other

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[3] Several acts of which Jackson complained occurred within the requisite filing period. As argued above, the District Court should have applied a six-year, rather than a two-year statute of limitations to Jackson's claims under the LAD. Since that would encompass all events since September 15, 1992, Jackson's failure to promote claims of 1994, 1995 and 1996 all fall within the appropriate filing period. She also met the 300-day time period under Federal law to file suit; she received her right to sue letter from the EEOC on July 17, 1998, and filed suit on September 15, 1998. Jackson therefore met all applicable timing requirements.

African-American professionals testified to experiencing the same racial animus from King. King tainted Jackson's employment by subjecting her to undue criticisms and denied promotional opportunities because of her race, age and sex. King's discriminatory animus infected Jackson's employment so that subsequent supervisors considered her to be a non-performer.

(b) Being aware during her employment of other discrimination against similarly situated employees. For example, another claims examiner, Covington, testified that when he reported to defendant King, King marginalized his work, denied him raises and bonuses, unduly criticized him by nitpicking his work, denied him promotional opportunities and demeaned him.

(c) Similarly situated employees who were Caucasian and younger, either worked in an actual or quasi-subordinate relationship to Jackson, had less experience and other credentials, had less seniority than Jackson, and had performance issues, yet they received promotions denied to Jackson, were not subject to criticisms in their performance evaluations or otherwise and were not terminated.

(d) The racially based discrimination and denial of promotional opportunities continued when Jackson transferred from the New York office to the New Jersey office, where she reported to defendant Gaffney. She had no assigned office, no telephone, no computer, and no files. Gaffney and another employee, Wallace, in Jackson's presence, mimicked voices designed to imitate a minstrel or "Amos 'N' Andy" show.

Gaffney's racial bias translated directly into differential treatment of Jackson by evaluating her file handling of previous matters, contravening Chubb's audit guidelines, which mandated review of newly-assigned cases only.

(e) After informing defendants that she believed that she was being denied promotional opportunities because of her race, age and sex, Jackson suffered substantially increased criticism, was placed on a performance improvement plan that was doomed to fail, assigned an unreasonable and excessive workload, and was eventually terminated. Moreover, defendants never properly investigated Jackson's concerns by failing to interview key witnesses.

Significantly, because of Chubb's false representations, no single specific event in this continuous pattern of violations placed Jackson on notice that she had been discriminated against or that she should file suit, including Jackson's failure to promote claims. The denials of promotion were consequences of the overall pattern of racial discrimination that infected her employment with Chubb and the hostile work environment endured by Jackson. Jackson did not know about other promotional opportunities until it was too late, because their existence was passed by word-of-mouth, and they were already filled by the time she learned about them.

Furthermore, Jackson complained to Chubb's Human Resources Department ("HR"), seeking informal redress. Because of Chubb's representations, Jackson expected HR to investigate and resolve her concerns. Pat Hurley of HR only interviewed one or two witnesses, and based on her half-hearted investigation never found any discrimination.

Because of Chubb's false representations, Jackson had no reason to believe that any single failure to promote her should have, somehow, placed her on notice that she was the victim of discrimination and that she should have filed

suit. She reasonably believed that HR would duly investigate and resolve her concerns, and only realized after her termination that Chubb's discrimination policy was a sham.

These facts are easily distinguishable from *Rush*, one of the very cases cited by the District Court in its September 1, 2000 opinion, which explains how to evaluate a continuing violation. In *Rush*, the plaintiff complained of sexual harassment, and was denied opportunities for training and promotion on the basis of her sex. *Id.* at 477. While she filed an EEOC complaint in 1991, she did not include claims of sexual harassment until her supplementary EEOC complaint in 1993. *Id.* at 478-9.

First, *Rush* concluded that the plaintiff's claims for sexual harassment constituted a continuing violation. *Id.* at 486. The Court found at the time of the plaintiff's 1991 EEOC filing, the frequency of harassment had not intensified to the point where she recognized sexual harassment was taking place. *Id.* at 482-83. Only after she filed her EEOC complaint did the harassment truly begin, which included disparaging remarks, criticism of her work, and frequent inappropriate touching by co-workers. *Id.* Concluding that plaintiff's sexual harassment claims were a continuing violation, the Court held,

> [T]he evidence supports a finding that Rush suffered continuous sexual harassment, at least from the time she filed the original EEOC charge. The harassment did not consist of unrelated incidents, but constituted a continuous pattern of derogatory remarks, rude behavior, and discriminatory conduct. Her failure to claim harassment in the 1991 EEOC charge does not destroy her claim, because the evidence shows that the harassment intensified, and, moreover, she did not realize early on how pervasive or severe the harassment was. *Id.* at 483.

This factual pattern precisely tracks the present case. Jackson suffered racial and derogatory remarks at the hands of King, and did not realize just how pervasive those racial remarks were until she complained to HR in 1995. Her complaints resulted in additional racial comments and denial of promotional opportunities; a pattern of behavior that followed Jackson upon her transfer to the New Jersey office, where the racially-based discrimination and retaliation only continued[4].

Jackson satisfied all requirements for a continuing violation theory of recovery. Moreover, under *Ali*, a six-year statute of limitations, as opposed to a two-year statute of limitations, should apply to Jackson's NJLAD claims under New Jersey state law. Since Jackson filed her complaint in September 15, 1998, she is permitted to recover for all discrimination and retaliation from September 15, 1992. Jackson also demonstrated the interrelation of all of her claims; i.e. the hostile work environment. She therefore respectfully requests that a writ of certiorari be granted to address the deprivation of her property right in her cause of action.

II. DISMISSAL OF JACKSON'S NJLAD CLAIM WAS ERRONEOUS UNDER THIS COURT'S CONTROLLING PRECEDENT.

Having already amply demonstrated that the statute of limitations for Jackson's NJLAD claims should have been six years, and that Jackson met her burden of demonstrating the viability of her "continuing violation" theory, the courts below misapplied controlling precedent in granting and affirming summary judgment because Jackson demonstrated substantial evidence of pretext.

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[4] See *National Railroad Passenger Corporation v. Morgan*, __ U.S.___, 122 S. Ct. 2061 (2002) as to viability of continuing theory as to work place harassment as found in on-going discrimination herein, separate and apart from discrete acts of discrimination. *Morgan* was decided three days after the Court of Appeals announced its decision in this matter and was not considered by the Court of Appeals.

A. The Standard.

The burden-shifting framework adopted for Title VII cases, as set forth by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is the appropriate standard of proof for NJLAD cases. *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 82, 389 A.2d 465, 479 (1978). Under this test, as promulgated by subsequent cases and adopted in New Jersey,[5] a plaintiff need only make her prima facie showing of discrimination and retaliation by pointing to evidence establishing a reasonable inference that the employer's proffered explanation should not be accepted.[6]

The burden then shifts to the defendant to articulate a legitimate business reason for its decision. Once a defendant articulates such reason, the plaintiff does not need to present additional evidence of discrimination and retaliation beyond that prima facie case.[7] As clarified by this Court, evidence supporting a prima facie case may also be used to prove pretext, and a trier of fact may rely on such evidence to find unlawful discrimination. In other words, a plaintiff, in order to show pretext, need not submit additional, independent evidence beyond what is used to establish the prima facie

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[5] *See Olson v. General Elec. Astrospace*, 966 F. Supp. 312, 315 (D.N.J. 1997); *Sheridan v. E.I. DuPont de Nemours and Co.*, 74 F.3d 1439, 1438 (3d Cir. 1996); *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 495 (3d Cir. 1995); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995); *Blume v. Denville Township Bd. of Educ.*, 334 N.J. Super. 13, 756 A.2d 1019 (2000).

[6] A plaintiff establishes a prima facie case of discriminatory treatment by demonstrating that: (1) she is a member of a protected class, (2) she was competent to perform her job, and (3) she was replaced. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). To establish a prima facie case of retaliation, a plaintiff must show that, "(1) she was engaged in a protected activity known to the defendant; (2) she was thereafter subjected to an adverse employment decision by the defendant; and (3) there was a causal link between the two." *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 274, 675 A.2d 684 (App. Div. 1996); *Romano v. Brown & Williamson Tobacco Corp.*, 284 N.J. Super. 543, 548-49, 665 A.2d 1139 (App. Div. 1995).

[7] *See Sheridan v. E.I. DuPont de Nemours and Co.*, 74 F.3d 1439, 1438 (3d Cir. 1996); *Waldron*, 56 F.3d at 495.

case.[8] She need only point to evidence establishing a reasonable inference that the employer's proffered explanation should not be accepted.[9] Therefore, while Jackson must respond to the defendants' explanation, she need not produce any additional evidence to support that response.

Where the underlying action rests upon pretext, as here, the plaintiff may defeat summary judgment by showing, "... some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinate cause of the employer's actions."[10] Where the reviewing court determines that there is a genuine issue of material fact regarding the employer's proffered non-discriminatory reason for terminating a plaintiff, summary judgment cannot be entered as a matter of law. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 331 (3d Cir. 1995); *Barber v. CSX Distribution Services*, 68 F.3d 694, 701 (3d Cir. 1995); *Waldron*, 56 F.3d at 504; *Torre v. Casio, Inc.*, 42 F.3d 825, 833 (3d Cir. 1994); *DeJoy v. Comcast Cable Communs.*, 968 F. Supp. 963, 978-79 (D.N.J. 1997). This is particularly so in a discrimination case, such as here, where pretext is a material issue.

Moreover, the Court of Appeals in *Sempier v. Johnston & Higgins*, *infra*, held that, where "each party has produced testimony and evidence that conflicts on the ultimate issue – whether ... [the employee] was discharged for poor performance or because of his age... [t]he resulting conflict must be resolved by a jury and cannot be resolved by summary judgment." *Sempier*, 45 F.3d at 732 (emphasis added). The Court of Appeals has also held, "[a]t the prima

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[8] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The Appellate Division of the Superior Court of New Jersey subsequently adopted *Reeves*. *Blume v. Denville Township Bd. of Educ.*, 334 N.J. Super. 13, 756 A.2d 1019 (2000).

[9] *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995), *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) (citations omitted).

[10] *Fuentes*, 32 F.3d at 764 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-511, 113 S.Ct. 2472, 2479, 125 L.Ed.2d 407 (1993); *DeJoy v. Comcast Cable Communs.*, 968 F.Supp. 963, 978-79 (D.N.J. 1997).

facie case stage of the analysis, we merely determine whether a plaintiff has presented sufficient evidence so that we should consider a defendant's proffered reasons for its decision and, if the defendant has presented reasons, the plaintiff's evidence of pretext." *Jones v. School District of Philadelphia*, 198 F.3d 403 (3d Cir. 1999).

As to what kind of evidence is deemed "pretextual," New Jersey and federal case law are replete with examples and specifics. Generally, pretext may be proven through either direct evidence showing that the discriminatory reason more than likely motivated the employer, or through indirect evidence showing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256; *Churchill v. International Business Machines*, 759 F. Supp. 1089, 1104 (D.N.J. 1991); *Miller v. Beneficial Management Corp.*, 776 F. Supp. 936 (D.N.J. 1991). Specifically, a complainant may present evidence of the respondent's past behavior, including instances of racial discrimination against others. *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). Pretext may also be demonstrated by evidence showing that in a comparable factual situation, persons in a different, unprotected group were treated more favorably or that the respondent departed from its normal policies, implying a differential in treatment from other similarly situated persons. *See, e.g. Burdine*, 450 U.S. at 254-56; *Worthy v. U.S. Steel Corp.*, 616 F.2d 698 (3d Cir. 1980)(case remanded for findings of fact regarding comparability between suspended plaintiff's safety record and that of white employees with allegedly similar safety records who were not suspended); *Weldon v. Kraft, Inc.*, 896 F.2d 793 (3d Cir. 1990)(inference of pretext found where black plaintiff showed that employer had a history of difficulties with black employees; this showing was sufficient to deny summary judgment); *Bennun v. Rutgers*, 737 F. Supp. 1393 (D.N.J. 1990) (pretext found where plaintiff proved that employer applied different standards to plaintiff in evaluating his achievements).

Evidence of discriminatory animus may also be used to establish pretext. In *Becker v. ARCO*, 207 F.3d 176 (3d Cir. 2000), the Court was mindful of, and noted approvingly, other

Circuits' holdings that discriminatory animus had enormous legal relevance to discrimination actions:

> ... as a general rule, evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is relevant and admissible under the Federal Rules of Evidence to establish whether a defendant's employment action against an employee was motivated by invidious discrimination. *See, e.g.* ... *Robinson v. Runyon*, 149 F.3d 507, 512-13 (6th Cir. 1998) (noting that evidence of a racially hostile atmosphere was admissible in Title VII suit to illustrate decision maker's attitude); ... *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986) (upholding District Court's admission of evidence of harassment of other workers to show that employer condoned racial harassment); ... *Glass [v. Philadelphia Electric Co.]*, 34 F.3d [188] at 194-95 (evidence of prior racial harassment was relevant to whether plaintiff was terminated because of age and/or race discrimination)...*Id.* at 194 (emphasis supplied).

Evidence of prior harassment or disparate treatment of a member of a protected class is therefore relevant and admissible. More specifically, courts have found that evidence tending to show a pervasive environment of racial discrimination is directly relevant to the question of whether an employer created an environment conducive to violating our discrimination laws.[11] *Lehmann v. Toys 'R' Us, Inc.*, 132

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[11] In New Jersey, "evidence of other acts of discrimination is admissible to prove an employer's motive or intent to discriminate," pursuant to N.J.R.E. 404(b). *Rendine v. Pantzer*, 276 N.J. Super. 398, 426-28, 648 A.2d 223 (App. Div. 1994)(discriminatory treatment of other admissible to proving sex discrimination action), *citing Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990)(testimony of two former employees admissible in age discrimination case, where employees testified about defendant employer's age discrimination against them); *Connolly v. Burger King Corp.*, 300 N.J. Super. 344, 693 A.2d 114 (App. Div. 1997)(other claims of discrimination are discoverable). *See also Estes v. Dick Smith Ford, Inc.*,

N.J. 587, 611, 626 A.2d 445, 457, *citing Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), disapproved of on other grounds, *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). "[E]vidence of other acts of harassment is extremely probative as to whether the harassment was ... discriminatory...." *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999). Under *Blume v. Denville Township Board of Educ.*, 334 N.J. Super. 13, 756 A. 2d 1019 (2000), pretextual evidence of discriminatory animus is admissible because it supports the elements of a prima facie showing. Additionally, it is probative as to the existence of the discrimination itself. As admissible evidence, then, it raises a material fact issue requiring a trial.

B. The facts.

The facts are replete with examples demonstrating a pattern of discrimination and retaliation, raising material facts which preclude summary judgment. Chubb employed Jackson in 1989, and defendant King uttered racial jokes in the early 1990s when he held supervisory authority over Jackson. Defendant King supervised Jackson from 1989 through 1995, and, as Jackson's complaint alleges, his racially motivated discrimination against Jackson began before 1994. Jackson provided several examples of how defendant King discriminated against other African-Americans before 1994, as backdrop evidence to the similar pattern of discriminatory conduct visited upon the plaintiff. Chubb was also sued in the mid-1990s by claims examiners for age-based and national origin discrimination. Not only do these undisputed facts meet Jackson's *McDonnell Douglas/Burdine* burden, but also these operative facts, in addition to the backdrop evidence, took place before and after 1994. These operative facts are specific incidents, and not just evidence of a pattern of

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856 F.2d 1097 (8th Cir. 1988)(evidence that defendant excluded African-Americans from its workforce and used racial slurs, was admissible to prove unlawful motive and to disprove defendant's explanation for plaintiff's discharge); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597-98 (1st Cir. 1987)(evidence that plaintiff and another supervisor were denied salary raises because of their sex was admissible as "circumstantial evidence of a discriminatory atmosphere" and "evidence of a corporate state-of-mind").

continuous discrimination. And as *Ali* held, where some of the operative facts alleged in Jackson's case took place before and after the *Montells* decision, the two-year statute of limitations period recognized in *Montells* did not govern the plaintiff's claim. Since Jackson filed her initial complaint in September 15, 1998, Jackson is entitled, under *Ali*, to include those discriminatory actions of the defendants dating to September 15, 1992. Moreover, *Ali* never abandoned Jackson's continuous violation theory for proving her NJLAD claims, the facts of which date well before the operative date of *Montells*.

In 1996 and 1997, Jackson engaged in protected activity when she complained that she discriminated on the basis of her race, age or sex. It is undisputed that CEO Degnan knew of these complaints because he purportedly acted as Jackson's mentor and admitted to discussing this with the Vice President of HR, Hurley. Hurley performed a superficial inquiry into her claims, and immediately thereafter Jackson was set up for termination.

1. Defendants' Inconsistent Statements Demonstrate That Their Articulated Reasons Are Unworthy Of Credence And Preclude Summary Judgment Under Reeves.

The District Court granted summary judgment in direct contravention of established authorities, holding that summary judgment is inappropriate, where, as here, the trier of fact could determine that a defendant's articulated nondiscriminatory reasons for actions against an employee could be a pretext for discrimination or retaliation.[12]

Defendants' witnesses testified that Jackson was not qualified for promotion because she was not performing in her current position as D&O Examiner, either because her performance was allegedly deficient or her caseload was neither unreasonable nor allocated to her to set her up for failure. However, against this testimony, the defendants' own documents and other witnesses (such as the Ellis and

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[12] *Wilson v. Parisi*, 268 N.J. Super. 213, 633 A.2d 113 (App. Div. 1993), *Woods-Pirozzi, supra*, *Kelly v. Bally's Grand, Inc.*, 285 N.J. Super. 422, 667 A.2d 355 (App. Div. 1995).

Gaffney declarations) contradict these assertions, and show a material fact issue in dispute, which is only then within the province of a jury to decide.

Defendants' own documents demonstrate Jackson managed more cases than usually assigned to claims examiners, even when the caseloads for all examiners were increased. She consistently handled a heavier caseload than similarly situated Caucasian, younger examiners.

The defendants' own interoffice communications show that despite a decrease in the staff of claims examiners, Jackson achieved excellent settlement outcomes and reduced the New York field office's caseload. Defendants own evidence merely shows that Jackson's performance qualifications are disputed by both parties and therefore should be submitted to the jury.

Defendants submitted further conflicting evidence on whether she performed her job, and was subject to differential treatment as to settlement authority and promotions. Jackson was recommended for higher reserve authority to allow her to be more proactive and flexible in the disposition of her files. That request was denied, which adversely impacted upon her effectiveness from 1994 through 1997.

Jackson met all performance standards, even receiving an award. While Jackson was continually subjected to criticism, her performance was so impeccable that, in 1993, her supervisor, Hogrefe, recommended increasing her settlement authority from $600,000 to $2,000,000. Defendant Degnan, then defendant Chubb's CEO, refused to grant her this authority. He testified that he denied Jackson such settlement authority because of poor performance. These inconsistent statements raise an issue of material fact that can only be resolved by a jury.

Defendants' testimony regarding Jackson's role in her department is also conflicting. Mr. Ellis states in his deposition that Jackson has a keen mind and handled the most complex of cases, and supervised the examiners who were promoted over her. Yet Kristiansen and Petillo stated that all cases (even run-of-the-mill personal injury cases) were equal and Jackson did not supervise anyone. Thus issue

of Ms. Jackson's handling of complex litigation is a material fact dispute for submission to the jury.

Defendants also contended that Jackson was solely responsible for not meeting deadlines, yet at the same time, admitted that the unit secretary, Diana Barrow, who was responsible for Jackson's secretarial support, was terminated for manipulating data. (This lack of secretarial support impacted upon Jackson's ability to perform her job and considerably affected Jackson's ability to perform.

The defendants also contend that Jackson completed assignments late, but the evidence demonstrates that delay was attributed to Chubb's failure to account for her files. In several of the cases upon which Jackson received criticism, the actual physical files were lost in transit, forcing Jackson to recreate those files. Rather than admitting these circumstances caused delays in Jackson's work product, the defendants took advantage of a problem, created through their own dysfunction and lack of company organization, and sought to unjustifiably paint Jackson as a non-performer.

2. Rebuttal Evidence Demonstrating Defendant's Proffered Business Reasons For Denying Jackson The Position Of Corporate Liability Examiner Demonstrated Pretext And Precluded Summary Judgment.

There is substantial pretext evidence to rebut defendants' conflicting testimony in articulating why Jackson was not promoted to the position of Corporate Liability Examiner in favor of Elliott. Elliott was hired for the position because of her "bad faith litigation" background. However, Elliott testified that she lacked hands-on experience in this area, with only a limited role in testifying in bad faith cases brought by Chubb insureds. Spell also stated he hired Elliott without opening the position to others, as she was second on the list after Stollsteimer originally accepted the position. Elliott never knew that she was the next best candidate in 1995. In 1996, without any job posting or notice to other employees that the position was once again open, Bob Bragg informed her that Spell would contact her directly about filling the position.

3. Subjective Decision-Making Was Applied To Jackson, Thereby Precluding Summary Judgment.

The trial court may not dismiss an action on summary judgment where defendants failed to use objective decision-making in deciding upon promotions, performance ratings and termination decisions. *Goosby v. Johnson & Johnson Medical, Inc.*, 228 F.3d 313 (3d Cir. 2000). Testimony by Chubb's upper management demonstrated that there were no written guidelines for Chubb supervisors or managers to follow for making objective decisions on whether to promote, evaluate or terminate employees. Further, promotional opportunities were not posted; employees obtained positions within the company based upon word of mouth, or when a supervisor, based upon subjective decisions about an employee, approached an employee to fill a job. Thus, *Goosby* is directly on point, and summary judgment should have been denied because Chubb's criteria for denying Jackson employment opportunities, rating her performance and terminating her were subjective.

Subjective decision-making was involved in determining Jackson's terms and conditions of employment. Chubb's employment practices lacked any objective standards upon which managers and supervisors could evaluate employees, and decide their raises, promotions and terminations. Doris Johnson, a member of upper management in charge of the administration of examiners, including HR functions, admitted that there was an absence of such standards. Moreover, as to the position of Senior Zone Examiner, Johnson testified no written criteria for promotions existed. One did not need a college degree, a law degree or even requisite experience to be promoted. The lack of such standards, including the fact that employees were hired by word of mouth, or at the whim of supervisors who would privately solicit employees who fit their own criteria for a position, paved the way for discriminatory decision-making and validation of the Chubb "old boys network."

4. Evidence Of Differential Treatment Of Jackson Demonstrates Pretext And Precludes Summary Judgment.

Lesser-qualified individuals, as compared to Jackson, were promoted and otherwise recognized for their work. These individuals were similarly situated and younger than Jackson, with demonstrated performance issues. Rather than criticize or otherwise terminate these employees, however, Chubb demonstrated its discriminatory practices by promoting them. This differential treatment of others similarly situated to Jackson also demonstrates Chubb's articulated reasons are pretextual, thus precluding summary judgment.

Petillo, a claims examiner who worked with Jackson in 1993, received extremely favorable performance reviews, even though her manager, Gaffney, noted that she had not completed a D&O memo according to company guidelines. Further, Sharkey, a Caucasian male, achieved an overall rating of "Met All" in his February 1996 performance review even though his supervisor noted that he did not prepare his coverage letters and D&O memos according to company guidelines. Surprisingly, although he received two "Met All" ratings out of five overall categories, he still received a final rating of "Exceeds Some." During the review period, he also failed to analyze and document a serious exposure position regarding the Genesco file. The company forgave this transgression by not addressing it in his performance review. While Chubb essentially discounted or forgave certain errors committed by Petillo, Sharkey and others (none of whom were African-American), Chubb made no such allowances when evaluating Jackson's work.

Jackson on several occasions was even denied opportunities to apply for the Corporate Liability Examiner position and other positions, being unaware of job vacancies until they had already been filled. On several occasions, Jackson established on the record that existence of these positions was made known exclusively by word of mouth. Because of the defendants' discriminatory actions, Jackson was excluded from this old boys network where primarily Caucasian managers shared information between them and

filled such positions based upon, "word of mouth." Jackson therefore could neither formally nor informally apply for these positions. As case law states, an individual need only be discouraged from applying for a position, and need not actually apply.[13] Each time the position was filled prior to Jackson's knowledge of such opening, and the person promoted was Caucasian.

5. Jackson Was Qualified For The Position Of Corporate Liability Examiner And Was Denied Such Position In Favor Of A Less Qualified, Caucasian Female.

The parties materially dispute whether Jackson was qualified for the position of corporate liability examiner and was denied such position in favor of Elliott, a younger, Caucasian employee. Thus, there are material facts in dispute on this issue alone and Jackson's discrimination claims should be submitted to the jury.

Jackson surpassed Elliott's qualifications, by reason of several years of litigation experience with a large New Jersey firm, meeting all performance targets and/or

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[13] *See EEOC v. Metal Service Company*, 892 F.2d 341 (3d Cir. 1990) (word-of-mouth hiring practice which results in a relatively small number of minority applicants is circumstantial evidence which helps to establish a reasonable inference of employer's discriminatory treatment of blacks as a class (citations omitted)); *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324, 365, 97 S.Ct. 1843, 1870, 52 L.Ed.2d 396 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.") *See also Teamsters*, 431 U.S. at 365, 97 S.Ct. at 1843, fn. 51 ("The far-ranging effects of subtle discriminatory practices have not escaped the scrutiny of the federal courts, which have provided relief from practices designed to discourage job applications from minority-group members." (citations omitted)); *National Association for the Advancement of Colored People v. Town of East Haven*, 998 F.Supp. 176 (D. Conn. 1998); *Payne v. Travenol Labs.*, 673 F.2d 798, 826-27 (5th Cir. 1982) (failure to post job vacancies can only discourage applications by African-Americans to a greater degree than it discourages whites who garner information through the grapevine), *cert. denied*, 459 U.S. 1038 (1982); *Lams v. General Waterworks Corp.*, 766 F.2d 386, 389, 391-92 (8th Cir. 1985) (word-of-mouth recruitment for promotion openings perpetuated segregation of the workforce and violated Title VII).

objectives for each performance year from 1989 to 1996, and achieved the designation award of Senior Claims Officer for outstanding performance in 1993. During that time, Jackson successfully managed numerous cases for Chubb's insureds; including litigation against Chubb itself, not limited to "bad faith litigation". Jackson even gave seminars on the subject. Elliott was merely peripherally "involved" in bad faith matters and lacked Jackson's extensive experience in complex and class action and securities litigation. Jackson received correspondence acknowledging her invaluable assistance in resolving Chubb claims. These accomplishments were not recognized in her performance ratings and she was never promoted, unlike persons similarly situated to her.

6. Evidence Of Discrimination Against Other African-Americans And Others Based On Nationality, Age And Sex, Demonstrates Pretext And Precludes Summary Judgment.

Pretext is also demonstrated by evidence showing that defendants more likely than not discriminated against Jackson based upon rampant discrimination by King, and others, where King, in particular, engaged in a repeated pattern of marginalizing and denying promotional opportunities to African-Americans and persons who were older, made racial jokes and failed to remedy, and in fact, blamed the victim of, a racial slur. King uttered racial jokes in the early 1990's when he had supervisory authority over Jackson. As Kristiansen testified in his deposition, he heard King make the following joke: "What is a renege? A shift change at the post office." Kristiansen also heard King mimic Asian accents when making racial jokes about Asians going to the dentist, referring to "two thirty" as "tooth hurty." Other African-American professionals, claims examiners and attorneys also testified to King's racial animus toward them in the 1990's. In particular, Akin, an attorney working for King from 1992-1994, complained to the company that a young white male subordinate called her a "Fucking Black Bitch" and an African-American secretary was also upset by this conduct. King bristled and admonished her for provoking the racial slur due to her alleged failure to properly manage this

particular white male. According to Akin, King instructed her to downplay this racial incident and intentionally omit any reference to the term "Black" when reporting it in writing.

Covington and McNicol, both African-American males, also were subject to discrimination by defendants King and Chubb. King found fault with their performance where none existed, recommended no bonuses, submitted reviews suggesting allegedly inferior performance, and caused Covington to resign rather than endure more racial discrimination from King. King also testified that he and Chubb were named parties in other discrimination lawsuits that charged him with age and national original discrimination.

Based upon the foregoing, the evidence shows that Jackson was subject to differential treatment, and other discrimination of African-American professional employees at Chubb who had the same supervisors, either directly or indirectly, suffered discriminatory animus within the workplace. The jury, as fact finder, can infer that performance ratings and promotional opportunities at Chubb were not decided on merit but on race, age and/or gender. Chubb shamelessly used subjective performance evaluations as weapons to destroy a career if one was a person of color, or over the age of 40, or female, and the company perceived the individual as not like one of them.

7. The Defendants' Ineffective Investigation Into Jackson's Claims Of Discrimination Is Evidence Of Pretext, Thereby Precluding Summary Judgment.

The defendants' failure to investigate these claims is also evidence of an ineffective anti-discrimination policy further demonstrating pretext. Jackson's claims of discrimination, which she communicated in 1995, 1996 and 1997, were never investigated by Hurley; a per se violation of the NJLAD, Title VII and the New York Human Rights Law. In fact, Chubb spent more time documenting reasons to criticize Jackson's performance and terminate her, than in conducting a truly impartial and thorough investigation as required by the NJLAD. *See Lehmann, supra.*

The failure of such investigation constitutes a per se violation of Jackson's right to a discriminatory-free work environment which in itself precludes summary judgment. Based upon the foregoing, summary judgment should not have been granted and affirmed, because established case law prohibits summary judgment where there is evidence of inconsistent statements, refuted evidence, differential treatment, subjective decision making, other discriminatory conduct and a failed discrimination policy, such as what exists here. A writ of certiorari should issue to prevent the loss of Jackson's property rights.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

Civ. No. 98-4361 (GEB)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIE N. JACKSON,
Plaintiff,

v.

CHUBB CORP., et al.,
Defendants.

Filed September 5, 2000

ORDER

This matter having come before the Court upon the motion of defendants to dismiss certain counts of the plaintiff's Third Amended Complaint; and the Court having considered the parties' submissions without oral argument pursuant to Fed. R. Civ. P. 78; and for the reasons stated in the Memorandum Opinion filed herewith;

IT IS this 1st day of September, 2000;

ORDERED that the defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

GARRETT E. BROWN, JR., U.S.D.J.

Civ. No. 98-4361 (GEB)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIE N. JACKSON,
Plaintiff,

v.

CHUBB CORP., et al.,
Defendants.

Filed September 5, 2000

MEMORANDUM OPINION

BROWN, District Judge

This matter comes before the Court upon the motion- of the defendants, Chubb & Son, Inc. ("Chubb") and the individual current and former Chubb employees named as defendants, to dismiss certain counts of the plaintiffs Third Amended Complaint ("Amended Complaint") pursuant to Fed. R. Civ. P. 12(b)(6). The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. For the reasons discussed in this Memorandum Opinion, issued without oral argument pursuant to Fed. R. Civ. P. 78, the defendants' motion is granted in part and denied in part.

I. BACKGROUND

This action arises from the allegedly discriminatory treatment that the plaintiff received while employed by Chubb as a claims examiner in Chubb' s Director and Officer Liability Department (the "D&O" Department"). See Amended Complaint at ¶ 35. fn1 The plaintiff is a 54-year old African-American female attorney. See id. at ¶¶ 32-34. In February 1989, she joined Chubb as a Claims Examiner in the D&O

Department in Chubb's Home Office in Warren, New Jersey. See id. After the plaintiff began her employment with Chubb, six other people joined the company and held the title of D&O Claims Examiner in Chubb's Home Office–Maggie Klimczyk, defendant Brian Kristiansen, Eric Schall, Jim Carson, Don Wroblewski and Lynn Stollsteimer. See id. at ¶ 40. From 1989 to 1993 the plaintiff reported to the defendants, Jeff King and King reported to the defendant, Malcolm Burton. See id. at ¶¶ 18 and 39. In 1993, the plaintiff began reporting to Kristiansen, who had been promoted to a supervisory position. See id. at ¶ 43. In 1994, King was replaced by the defendant, Kim Hogrefe. See id. at ¶ 46. Hogrefe abolished the Claims Examiner position in November 1994 and the plaintiff's title changed from Claims Examiner to Senior Claims Officer. See id. at ¶ 46. As a result of the elimination of her position, the plaintiff was transferred to the New York office where she reported to the defendant, Ed Ellis. See id. at ¶ 46. The plaintiff remained in this position until December 1996 when she was transferred to the Eastern Zone Office in New Jersey and she began reporting to the defendant, Susan Gaffney. That same year the plaintiff's title changed from Claims Examiner to Senior Claims Officer. See id. at ¶ 60. In March 1997, Gaffney gave the plaintiff a "met some" performance rating, see Id. at ¶ 63, and the plaintiff's employment with Chubb was terminated in June 1997, see id. at ¶ 65.

Among the allegations in the Third Amended Complaint, the plaintiff claims that as a result of discrimination on account of her race, sex and age, the plaintiff was given less opportunity to succeed at Chubb than younger white peers, that as a result of this allegedly discriminatory treatment, the plaintiff was denied promotions in November 1994 and January 1995, was transferred to New York in December 1994, and that she was terminated in June, 1997. See id. at ¶¶ 38, 43,46, 89, 90, 91, 92. 93 and 97.

Since September 1998, when the plaintiff filed her complaint alleging employment discrimination, the plaintiff has filed four amended complaints–the Amended Complaint, which

was flied in November 1998, the Second Amended Complaint, which was filed in February 2000, the "Revised" Second Amended Complaint, which was filed later in February 2000, and the Third Amended Complaint, which was filed in March 2000–the defendants have filed two dispositive motions, the Court has issued no fewer than 17 scheduling orders, and has convened numerous telephone and in-person status and discovery conferences, the plaintiff has also filed one appeal of magistrate judge's decision, which was denied, and one interlocutory appeal to the United States Court of Appeals for the Third Circuit of the district judge's decision, which was dismissed for lack of jurisdiction. More recently, the plaintiff retained new counsel, which necessitated several additional telephone and in-person conferences to resolve conflicts between the plaintiff and her former attorney and to facilitate the transfer of the plaintiffs file to her new attorney, and to reschedule certain discovery. Notwithstanding the massive amount of the parties' and the Court's resources devoted to this matter, the plaintiffs counsel has indicated that she will need additional time to complete discovery and prepare the case for trial, and that this two year-old case will not be trial ready until later this year.

It is difficult to discern from the plaintiffs multiple pleadings the exact contours of her legal claims. On or about September 15, 1998, the plaintiff filed a complaint in this Court alleging that the defendants, Chubb Corporation, Chubb & Son, Inc., Federal Insurance Company, Pat Hurley, Michael Marinaro, George Fay, Doris Johnson, Malcom Burton, Jeff King, Kim Hogrefe, Brian Kirstiansen, Susan Gaffney, John Degan. Ed Spell and Sylvester Green. fn2 "discriminated against the Plaintiff in employment on the grounds of her race, age, gender and color, denied her substantive and procedural due process of law, denied her equal protection of the laws. and intentionally subjected her to extreme emotional distress." Complaint at ¶ 1. The complaint asserted causes of action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"), see Complaint at ¶ 2, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §10001, et seq.

("ERISA"), see Complaint at ¶ 5. While paragraph 2 of the complaint sets forth multiple legal claims, the counts of the complaint assert causes of action only under Title VII and ERISA. Before serving any defendants with the original complaint, the plaintiff filed an amended complaint on or about November 19, 1998 that contained substantially similar allegations, but asserted additional legal claims for "wrongful discharge, promissory estoppel, fraudulent misrepresentation, intentional and/or negligent infliction of emotional distress, negligent supervision and/or violation of the doctrine of respondeat superior." Amended Complaint at ¶ 1. Additionally, the amended complaint cited to various federal statutes and constitutional provisions, including the Thirteenth Amendment, which abolished slavery, and the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA"). See Amended Complaint at ¶ 2. Additionally, the Amended Complaint cites to the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1, et seq. ("NJLAD"). See Amended Complaint at ¶ 86. On or about February 3, 2000, the plaintiff filed a second amended complaint and on or about February 14, 2000 a "revised second amended complaint." On or about March 2, 2000, the plaintiff filed the third amended complaint that is the subject of this motion.

Count I of the plaintiff's third amended complaint asserts various causes of action against the defendants for alleged discrimination on the basis of race under federal. New Jersey and New York law. See Amended Complaint at Count I. Specifically, Count I asserts causes of action under Title VII, the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981"), the New York Human Rights Law, N.Y. Exec. Law § 290, et seq. (McKinney 2000) ("NYHRL"), and NJLAD. Count II asserts causes of action against the defendants under the ADEA, NYHRL and NJLAD for alleged discrimination on the basis of age. See id. at Count II. Count m asserts causes of action against the defendants under Title VII, NYHRL and NJLAD for alleged discrimination on the basis of sex. See id. at Count III. Count IV asserts causes of action against the defendants under Title VII, § 1981 and NJLAD for alleged retaliation. See id. at Count IV. Count V asserts causes of action against the

defendants under ERISA for the alleged deprivation of pension benefits. See id. at Count V. Count VI asserts a cause of action against the defendants for breach of contract under New Jersey law. See id. at Count VI. Count VII asserts a cause of action against the defendants for wrongful discharge under New Jersey law. See id. at Count VII. Count VIII asserts a cause of action against the defendants for fraudulent misrepresentation under New Jersey law. See id. at Count VIII. Count IX asserts a cause of action against the defendants for negligent infliction of emotional distress under New Jersey law. See id. at Count IX. Count X asserts a cause of action against the defendants for intentional infliction of emotional distress. See id. at Count X. Count XI asserts a cause of action against the defendants for "conspiracy" under New Jersey law. See id. at Count XI. Count XII asserts a cause of action against the defendants for "violation of doctrine of respondeat superior" under New Jersey law. See id. at Count XII. Count XIII asserts a cause of action against the defendants for promissory estoppel under New Jersey law. See id. at Count XIII. Count XIV asserts a cause of action against the defendants for invasion of privacy under New Jersey law. See id. at Count XIV. Count XV asserts a cause of action against the defendants for "tortious interference with contract or with prospective advantage" under New Jersey law. See id. at Count XV. Count XVI asserts a cause of action against the defendants for "negligent supervision" under New Jersey law. See id at Count XVI.

The defendants' motion to dismiss is directed at a portion of the claims asserted in Counts I, II, m and IV, as well as the entirety of the claims asserted in Counts VI, VII, VII, IX, X, XI, XII, XIII, XIV, XV and XVI of the third amended complaint.

II. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

A motion to dismiss pursuant to Fed. R. Civ. P. 1 2(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most

favorable to plaintiff, plaintiff is not entitled to relief. Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986); Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939,944(3 d Cir.), cert. denied, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Angelastro, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

Under Rule l2(b)(6), the Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." Turbe, 938 F.2d at 428 (citing Unger v. National Residents Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1991); see also Dykes v. Southeastern Pennsylvania Transp. Auth., 68 F.3d 1564, 1565. n. 1 (3d Cir. 1995); Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.1994). A complaint may be dismissed for failure to state a claim where it appears beyond any doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the claim." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. See Papasan v. Allain, 478 U.S. 265, 286 (1986); see also Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to

dismiss").

A district court reviewing the sufficiency of a complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his [or her] claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Generally, when conducting such an inquiry, material beyond the pleadings should not be considered. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.), cert. denied, 510 U.S. 1042 (1994); Gannon v. Continental Ins. Co.. 920 F. Supp. 566. 574 (D.NJ.1996).

B. DEFENDANTS' MOTION TO DISMISS

The defendants assert five separate arguments in support of their motion to dismiss. First. the defendants argue that the plaintiff's failure to promote and discriminatory transfer claims brought under Title VII, the ADEA, NJLAD and § 1981 are barred by the applicable statutes of limitations. Second, the defendants argue that the plaintiff's common law claims are preempted by NJLAD. Third, the defendants argue that the plaintiff has failed to state a claim upon which relief can be granted under her breach of contract and promissory estoppel claims. Fourth, the defendants argue that even if the plaintiffs claims for fraudulent misrepresentation, negligent infliction of emotional distress, tortious interference with contract and prospective economic advantage, conspiracy, invasion of privacy and respondeat superior are not preempted, that those claims must be dismissed for failure to state a claim upon which relief can be granted. Finally, the defendants argue that even if the plaintiffs § 1981 claims are not time barred, the plaintiff has failed to state a claim upon which relief can granted under that statute.

The plaintiff's opposition brief addresses each of the defendants' arguments, and makes an additional request that "this matter be deferred pending completion of discovery per [Fed. R. Civ. P.] 56(f)." fn3

The Court will address first the plaintiff's request that decision on the instant motion be deferred pending the completion of discovery, and then turn to the separate grounds in the defendants' motion.

1. Rule 56(f) is Inapplicable to a Motion to Dismiss

The plaintiff first argues, relying on Fed. R. Civ. P. 56(f), that the defendants' motion to dismiss is premature because discovery in this two-year old case is ongoing.

Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). "Whether a Rule 56(f) [application] should be granted depends on the particular information that is sought, how the information, if brought out, would preclude summary judgment and why the information has not been previously obtained." DeJoy v. Comcast Cable Communications Inc., 968 F. Supp. 963, 994-95 (D.N.J. 1997) (citing San Filippo v. Bongiovanni, 30 F.3d 424,432 (3d Cir.1994), cert. denied, 513 U.S. 1082 (1995); St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1314 (3d Cir. 1994); Contractors Assoc. v. City of Philadelphia, 945 F.2d 1260 (3d Cir. 1991)). "Essentially, a party moving for postponement under Rule 56(f) must inform the district court why delay is needed before the motion can be properly considered." Id. at 995 (citing St. Surin. 21 F.3d at 1314).

The plaintiff's argument is without merit, and the request for deferral of a decision is denied for two reasons. First, the defendants' motion is not a motion for summary judgment

brought pursuant to Fed. R. Civ. P. 56, but rather is a motion to dismiss under Fed. R. Civ. P. 12(b). The Court has considered as true for purposes of this motion the facts alleged in the complaint. The plaintiff argues that the motion to dismiss can be considered as one for summary judgment pursuant to Fed. R. Civ. P. 12(b). However, the defendants have not relied upon facts outside the plaintiff's pleading and the court is not considering the defendants' motion as one for summary judgment or taking into account facts outside of the plaintiff's pleadings. Second, even if the Court were considering the defendants' motion as a motion for summary judgment, the plaintiff's affidavit submitted in support of the request is deficient because the plaintiffs counsel has not indicated precisely what discovery is needed to oppose the defendants' motion and how with that discovery the plaintiff will be able to present a successful opposition. Rather, counsel argues in a conclusory manner that "[t]he sheer extent of ongoing discovery and/of [sic] outstanding discovery requests confirm, by their volume, that each and every count of Plaintiffs complaint is in the process of being confirmed by discovery. . ." The affidavit of plaintiff's counsel in support of her Rule 56(f) request is deficient.

The plaintiff's request to adjourn the defendants' motion pending the completion of discovery is denied.

2. Relation Back of Claims Raised in Amended Complaints

The plaintiff's NYHRL and § 1981 claims raised in her Second and Third Amended Complaints, respectively, relate back to the date of her original complaint filed on September 15, 1998.

Amended pleadings relate back to the original pleading when those claims arise out of the same "conduct, transaction, or occurrence' as those presented in the original pleading. Fed. R. Civ. P. 15(c)(2). Here, the plaintiff's NYHRL and § 1981 claims arise out of the same sets of facts regarding her employment and termination as set forth in the original,

September 15, 1998 complaint.

Additionally, the Court must determine whether the defendants have been put on notice with respect to the claims raised in the amended complaint. See Farber v. General Elec. Co., Civ. A. No. 93-2349. 1994 WL 46519, *4 (E.D. Pa. Feb. 16. 1994). This inquiry involves a determination of whether the defendant. "viewed as a reasonably prudent person." should have been able to anticipate or expect that the original pleading "might be altered or that other aspects of the conduct, transaction, or occurrence . . . might be called into question." See id. (citing 6A Charles Alan Wright. et. al., Federal Practice and Procedure: Civil 2d § 1947 (West 1990) and Faust v. RCA Corp., 612 F. Supp. 540, 543 (M.D. Pa. 1985)).

Here, the claims set forth in the original complaint were sufficient to put the defendants on notice because of the broad allegations of employment discrimination alleged in that pleading. Since the claims presented in the amended complaints do indeed arise out of the same transaction or occurrence, the defendants should have reasonably expected that other claims might be raised with respect to the same or additional acts pertaining to the plaintiff's employment and/or termination. Thus, the plaintiff's amended complaints relate back to the original filing date and, therefore, September 15, 1998 will be the relevant date of filing for all claims.

3. Plaintiff's Claims Are Time-Barred

a) Title VII and ADEA

Actions brought under Title VII that were not previously brought before a state agency must be presented to the EEOC within 180 days of the alleged discriminatory act. See 42 U.S.C. § 2000e-5(e)(1). Because the plaintiff did not seek relief from a State or local agency, her Title VII claims are subject to a 180-day filing requirement. A complaint must be filed within 90 days of receipt of a notice of right to sue from

the EEOC. See 42 U.S.C. § 2000e-5(f)(1).

The plaintiff's ADEA claims, however, are subject to a 300-day filing requirement regardless of whether or not a claim was brought before a State or local agency. See 29 U.S.C. § 626(d)(2). Similar to her Title VII claim, the plaintiff had 90 days from receipt of a notice of right to sue from the EEOC to file a complaint. See 29 U.S.C. § 626(e).

The plaintiff filed her complaint with the EEOC on July 14, 1997; the EEOC issued her a notice of right to sue dated June 17, 1998; and she then commenced this action on September 15, 1 1998. Based on the 180-day filing requirement for her Title VII claims and the July 14, 1997 filing date of her EEOC complaint, the plaintiffs Title VII claims must pertain to alleged acts of discrimination occurring on or after January 14, 1997. In regards to her ADEA claims and the 300-day filing requirement, her claims must relate to unlawful employment practices occurring on or after September 10, 1996.

Under Title VII and ADEA, the statute of limitations begins to run from the date the discriminatory acts occur. See Delaware State College v. Ricks, 449 U.S. 250, 258-9 (1980) (concluding that the limitations period began to run when the plaintiff was notified of the decision denying him tenure). Furthermore, Defendants' alleged failure to promote, albeit repeated, does not constitute a "continuing violation." See Rush v. Scott Specialty Glass, Inc., 113 F.3d 476,483-4 (3d Cir. 1997) (stating that a failure to promote is a discrete event); West v. Philadelphia Electric Co., 45 F.3d 744, 756 (3d Cir. 1995) (holding that a denial of promotion is a discrete event that would trigger the plaintiffs duty to assert his [or her] rights). Here, as in Rush and Ricks, each of the alleged discriminatory acts – denial of promotion, discriminatory transfer, and wrongful termination – constitutes a discrete event, rather than a continuing violation. Therefore, the plaintiffs claims for failure to promote, which accrued in November 1994, January 1995, and July 1996 and discriminatory transfer which accrued in December 1994 are time-barred under ADEA because she did not file a claim with

the EEOC within 300 days of those events. Additionally, under Title VII, the preceding claims and also her failure to promote claim accruing in December 1996 are time-barred because the plaintiff failed to file these claims with the EEOC within 180 days of those events.

Plaintiff raises a question as to whether the date she submitted her charge questionnaire, April 25, 1997, should be considered the filing date of her EEOC claim. Plaintiff cites two cases, one from the Ninth Circuit and the other from the Western District of New York, that have held that the questionnaire is a filing for Title VII statute of limitations purposes. See Casavantes v. California State Univ., 732 F.2d 1441 (9th Cir. 1984); Halas v. Ford Motor Co., 987 F. Supp 227 (W.D.N.Y. 1997). However, printed on the acknowledgment statement on the questionnaire, signed and dated by the plaintiff, is the following: "[p]lease be advised that at this time, you have not filed a charge of discrimination. In order for the EEOC to have jurisdiction to investigate any complaint, and to protect your legal rights, a charge of discrimination must usually be filed within 300 calendar days of the alleged violation." [emphasis omitted]. Therefore April 25, 1997 is not the operative filing date of the EEOC charge of discrimination. The Court declines to follow the holdings of the cases relied upon by the plaintiff. Moreover, even if the Court were to apply the April 25, 1997 questionnaire date. the above-mentioned claims would still be time-barred with only the exception of the December 1996 failure to promote.

b) NJLAD and 1981

Section 1981 and NJLAD both are governed by a two-year statute of limitations. See Goodman v. Lukens Steel Co., 482 U.S. 656, 663-64 (1987) (adopting a two-year statute of limitations for all claims brought under § 1981); Zubi v. AT&T Corp., 219 F.3d 220. 226 (3d Cir. 2000) (holding that a two-year statute of limitations applies to § 1981 claims); Montells v. Haynes, 133 N.J. 282, 292, 627 A.2d 654. 659-60 (1993) (adopting New Jersey's two-year statute of limitations for personal injury actions for all claims brought under NJLAD);

Haines v. Township of Voorhees, Civ. No. 96-3032 (JEI), 1997 WL 714226, * 8 (D.N.J. Nov. 10, 1997) (applying New Jersey's two-year statute of limitations to NJLAD claim). However, the New Jersey Supreme Court held in Montells that the two-year statute of limitations for NJLAD claims would apply "only to cases in which the operative facts arise after the date of the decision, [July 27, 1993]." Montells, 133 N.J. at 298, 627 A.2d at 662. As to all other claims, where the operative facts arose before July 27, 1993, a six-year statute of limitations applies. See Martinez v. National Broadcasting Co., 877 F.

Supp. 219,230 (D.N.J. 1994) (post-Montells case applying six-year statute of limitations to NJLAD claim where the facts giving rise to the claim arose before Montells was decided). Here, the operative facts arose in and after 1994 and, therefore, the two-year statute of limitations applies to the plaintiff's NJLAD and § 1981 claims.

More significantly, the Third Circuit has recently addressed the issue of § 1981's statute of limitations and found that a two-year statute of limitations applies to § 1981 claims. See Zubi, 219 F.3d at 226. In that case, the court determined whether the language of 28 U.S.C. § 1658 created a four-year statute of limitations for § 1981 claims. Section 1658 was enacted on December 1, 1990 providing "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." Section 1981 was amended in 1991, adding a cause of action for alleged discrimination in the termination of contracts and Plaintiff Zubi argued, but the Court rejected, that the amended statute was an "Act of Congress enacted after [December 1, 1990]" for the purposes of 28 U.S.C. § 1658. See id. at 221. After examining the alternative approaches and interpretations of the statutory language and legislative intent, the Court concluded that while the 1991 amendment to § 1931 created a claim that was otherwise unavailable under its original enactment in 1870, the claim arose under an Act of Congress enacted before December 1, 1990. See id. at 226.

Plaintiff argues that there is a three-year statute of limitations for § 1981 claims, stating, without support that "plaintiffs § 1981 claims may be governed by the same period as that applicable to the NYHRL; namely, three years." See Plaintiffs Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Failure to State a Claim (hereinafter "P1. Opp.") p. 21. Plaintiff argues that this is "the most appropriate' period arising under State law." See id. at 20 (citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)). However, the Court concludes that because the forum is New Jersey and the parties are resident and non-diverse, the statute of limitations for personal injury actions under New Jersey law is the most appropriate. The Court, therefore, will apply New Jersey's two-year statute of limitation to the plaintiffs § 1981 claims.

As discussed in section II.B.3.A, supra, the plaintiffs failure to promote claims accrued in November 1994 and January 1995 her discriminatory transfer claim accrued in December 1994. None of these claims were filed within two years of those events.

Accordingly, the plaintiff's NJLAD and § 1981 claims related to the defendants' alleged failure to promote and discriminatory transfer are time-barred and must be dismissed. fn4

c) NYHRL

Claims brought under NYHRL are subject to a three-year statute of limitations period. See Patrowich v. Chemical Bank, 470 N.Y.S.2d 599, 604 (1st Dept. 1984), aff'd 473 N.E.2d 11 (N.Y. 1984). As discussed in section II.B .2, supra, the plaintiffs NYHRL claims asserted for the first time in the Third Amended Complaint relate back to the date of the original complaint which was filed on September 15, 1998. Therefore, any claims regarding alleged acts of discrimination under NYHRL occurring before September 15, 1995 are time-barred. Here, the plaintiff alleges that her December 1994 transfer to New York, the defendants' failure to promote her

in January 1995 and July 1996, and her termination in June 1997 violated NYHRL. The plaintiffs NYHRL claims arising from the alleged December 1994 discriminatory transfer and January 1995 failure to promote are time-barred because they accrued before September 15, 1995. The plaintiffs NYHRL claim based on the defendants' alleged discriminatory failure to promote her in July 1996, however, is timely. fn5

Accordingly, the plaintiff's NYHRL claims related to the defendants' alleged failure to promote and discriminatory transfer occurring in January 1995 and December 1994 are time-barred and must be dismissed. The plaintiffs NYHRL claim based on the defendants' alleged failure to promote her in July 1996 while she worked for Chubb in New York is timely and the defendants' motion to dismiss that claim is denied.

4. NJLAD Preempts Common Law Claims

It is well settled that common law claims based upon the same allegations as NJLAD discrimination claims are preempted by those asserted under the statute. See Dale v. Boy Scouts of America, 160 N.J. 562 (1999), rev'd on other grounds, 120 S. Ct. 2446 (2000). The plaintiff relies on and seeks relief for the same acts under both New Jersey common law and NJLAD.

The plaintiff attempts to circumvent NJLAD's preemptive effect by employing the narrow public policy exception announced in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58(1980). This exception, however, is not available here because the public policy against race, age, and gender discrimination, upon which the plaintiff relies, is actionable under NJLAD. See Catalane v. Gilian Instrument Corp., 638 A.2d 1341 (App. Div.), certif. denied, 642 A.2d 1006 (N.J. 1994) (holding that Pierce exception did not apply to violation of public policy against age discrimination because it was actionable under NJLAD.)

Similarly, the plaintiff's breach of contract and promissory estoppel claims are preempted by her NJLAD claim. See DeCapua v. Bell Atlantic-New Jersey, Inc., 313 N.J. Super 110, 128 (Law Div. 1998). Thus, the plaintiff's common law and contractual claims are subsumed by her claims under NJLAD.

Accordingly, the defendants' motion to dismiss the plaintiffs claims of breach of contract, wrongful discharge, fraudulent misrepresentation, negligent infliction of emotional distress, intentional infliction of emotional distress, conspiracy, violation of respondeat superior, promissory estoppel, invasion of privacy, tortious interference with contract or with prospective advantage, and negligent supervision is granted.

5. Failure to State a Claim: Breach of Contract and Promissory Estoppel

Defendants offer alternative arguments that the plaintiff has not stated a claim for breach of contract or promissory estoppel. As discussed in the preceding section, these claims are preempted by her statutory NJLAD claim and therefore, the Court need not address whether the plaintiff has stated a claim for breach of contract or promissory estoppel.

6. Failure to State a Claim: Common Law Claims

Defendants offer alternative arguments that the plaintiff has not stated a claim with respect to the following common law claims under New Jersey law: wrongful discharge, fraudulent misrepresentation, negligent infliction of emotional distress, intentional infliction of emotional distress, conspiracy, respondeat superior, invasion of privacy, tortious interference with contract, and negligent supervision. As discussed in the preceding section, these claims are preempted by her statutory NJLAD claim and therefore, the Court need not address whether the plaintiff has stated a claim under New Jersey law.

7. Failure to State a Claim Under 12 US. C. §1981

Finally, the defendants argue that the plaintiff cannot maintain a cause of action under § 1981 because she was an at-will employee. There is a split in authority as to whether an at-will employee has a cause of action under § 1981. Neither the Supreme Court nor the Third Circuit has ruled on this issue, and the Court has not uncovered any reported District of New Jersey cases addressing the issue. fn6

Section 1981 protects against racial discrimination in contracts by providing "[a]ll persons within the jurisdiction of the United States [with] the same right. . . to make and enforce contracts as is enjoyed by white citizens." 42 U.S.C. § 198 1(a). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

In Lauture v. International Bus. Mach. Corp., the Second Circuit held that at-will employees can state a claim for racially discriminatory termination pursuant to § 1981. 216 F.3d 258, 263 (2d Cir. 2000). Similarly, in Spriggs v. Diamond Auto Glass, an at-will employee's claim for wrongful termination under § 1981 was allowed to go forward because the Court found that he had an "at-will employment contract with [his employer]." 165 F.3d 1015, 1020 (4th Cir.1999). In Fadeyi v. Planned Parenthood Ass'n of Lubbock, at-will employment was held to be a contractual relationship for the purposes of stating a claim pursuant to § 1981. 160 F.3d. 1048, 1050 (5th Cir. 1998) fn7; see also Perry v. Woodward 199 F.3d 1126, 1132-34 (10th Cir. 1999), cert. denied, 120 S. Ct. 1964 (2000). Therefore, in some jurisdictions, at-will employees can state a claim for wrongful termination pursuant to § 1981.

Alternatively, other courts have held that at-will employees are not within the ambit of §1981's protections, and therefore, those employees do not have a cause of action under the statute for termination. Those courts have held that an

employer should not be held liable under § 1981. See, e.g., Bishop v. Avera, 177 F.3d 1233, 1236 (11th Cir. 1999) (reversing denial of summary judgment on at-will employee's § 1981 claim). These courts have reasoned that at-will employment does not create a "contract" between employee and employer that would give the former a claim under § 1981. See Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1033-35 (7th Cir. 1998). In Gonzalez, the employee could not claim that she was discriminated against in her layoff because she was an at-will employee "and did not have any contractual tights regarding the term of her employment." Id., at 1035. Similarly, here, the plaintiff, an at-will employee, did not have an employment contract with respect to the duration or terms of her employment, and therefore, cannot bring a claim for wrongful termination under § 1981.

The Court concludes that under the plain meaning of the statute, an at-will employee cannot maintain a cause of action pursuant to § 1981.

Accordingly, to the extent the plaintiff's claims under § 1981 are not time-barred, see section II.B.2.b, supra, including her claim for wrongful termination, those claims must be dismissed for failure to state a claim upon which relief can be granted.

III. CONCLUSION

The defendants' motion to dismiss the plaintiffs ADEA claims arising from the alleged November 1994, January 1995, and July 1996 discriminatory failure to promote and the December 1994 discriminatory transfer is granted. The defendants' motion to dismiss the plaintiff's Title VII claims arising from the alleged November 1994, January 1995, July 1996, and December 1996 discriminatory failure to promote and the December 1994 discriminatory transfer is granted. The defendants' motion to dismiss the plaintiff's NJLAD and § 1981 claims arising from the alleged November 1994 and January 1995 discriminatory failure to promote and December 1994 discriminatory transfer is granted. The

defendants' motion to dismiss the plaintiffs NYHRL claims arising from the alleged December 1994 discriminatory transfer and January 1995 failure to promote is granted. Additionally, the defendants' motion to dismiss the plaintiff's NYHRL claim arising from the termination of plaintiffs employment is granted because the plaintiff failed to state a claim upon which relief can be granted. The defendants' motion to dismiss the plaintiffs New Jersey state law claims alleged in Counts VI-XVI is granted because those claims are preempted by NJLAD. Finally, the defendants' motion to dismiss the plaintiffs § 1981 claim arising from the plaintiff's allegedly discriminatory termination is granted because the plaintiff, an at-will employee, failed to state a claim upon which relief can be granted under § 1981.

GARRETT E. BROWN, JR., U.S.D.J.

Footnotes

fn1 Because this matter comes before the Court on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b), the relevant facts are taken from the plaintiff's Third Amended Complaint, and are assumed, for purposes of this motion, to be true.

fn2 Since filing the original complaint, the plaintiff has added Ed Ellis, Jim Gardner, Ron Goldstein and Aaron Goldstein as additional individual defendants. See Third Amended Complaint.

fn3 The plaintiffs opposition brief was submitted by her previous counsel. In telephone conferences held with the Court on June 5 and 12, 2000, the plaintiffs new attorney indicated that she is relying on her predecessor's brief and did not wish to file an additional brief in opposition to the defendants' motion.

fn4 Even if all of the plaintiffs claims under § 1981 meet the statute of limitations, there is no viable cause of action under the statute because the plaintiff was an at-will employee. See II.B.7 below.

fn5 There is no cause of action for a non-resident of New York against a New York corporation for acts of discrimination committed outside of New York. See Iwankow v. Mobil Corp., 541 N.Y.S.2d 428 (1st Dept. 1989); Brink v. Union Carbide Corp., 41 F. Supp.2d 406, 418 n. 31 (S.D.N.Y. 1999). Furthermore, there is no cause of action for New York residents against out-of-state corporations for acts occurring outside of New York. See Sherwood v. Olin Corp., 772 F. Supp. 1418, 14231-25 (S .D.N.Y. 1991). It then follows that a non-resident does not have an actionable NYHRL claim against an out-of state corporation for acts committed outside of New York. Thus, since her termination occurred in New Jersey, the plaintiff fails to state a claim with respect to her June 1997 termination. The plaintiff's termination was communicated to her by Sue Gaffney who was the plaintiff's supervisor in New Jersey while the plaintiff was employed in New Jersey. See Amended Complaint at ¶ 65. The Court finds that even though Michael Marinaro, who was employed in New York, faxed an unsigned letter of termination, the plaintiff's claim of wrongful discharge does not come within the purview of NYHRL because the plaintiff, a New Jersey resident, was terminated by Sue Gaffney in New Jersey while the plaintiff was working in New Jersey.

The plaintiff has stated a claim, however, with regards to the alleged failures to promote during her employment in New York due to the fact that the resultant harm of the alleged discrimination was experienced by the plaintiff in New York even though the promotions of her co-employees took place in New Jersey, by New Jersey employees. As discussed above, the July 1996 failure to promote claim is actionable under NYHRL as it is the only one that is alleged to have occurred during the three-year statute of limitations.

fn6 The plaintiff cites Davis v. United States Steel Supply, Div. of US. Steel Corp., 581 F.2d 335 (3d Cir. 1978), as supportive of her contention that at-will employees have a cause of action under § 1981 because in that case, the Court analogized the plaintiffs common law claim to her federal statutory claims for statute of limitations purposes. See

Davis, 581 F.2d at 340, 341 n.7. The Davis Court did not, as the plaintiff argues, hold that at-will employees have a cause of action for wrongful termination under § 1981. Furthermore, this decision was vacated in Davis v. United States Steel Supply, Div. of U.S. Steel Carp, 688 F.2d 166 (3d Oh. 1982), cert. denied, 460 U.S. 1014 (1983), and thus, the plaintiff's reliance on it is misplaced.

fn7 However, Fadeyi is distinguishable from the case at bar because, in that case, the defendant-employer had less than 15 employees, thus making a claim under Title VII unavailable to the plaintiff. See Id. at 1049. The plaintiff in the present case is not similarly limited in her available claims/remedies and thus, the Court finds it unnecessary to read a cause of action into the statute.

Civ. No. 98-4361 (GEB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARIE N. JACKSON,
Plaintiff,

v.

CHUBB CORP., et al.,
Defendants.

March 21, 2001, Decided

March 21, 2001, Filed

COUNSEL:
For MARIE N. JACKSON, plaintiff: LINDA WONG, WONG, TSAI & FLEMING, PC, EDISON, NJ.

For CHUBB & SON, INC., FEDERAL INSURANCE COMPANY, PAT HURLEY, MICHAEL MARINARO, GEORGE FAY, DORIS JOHNSON, MALCOLM BURTON, JEFF KING, KIM HOGREFE, BRIAN KIRSTIANSEN, SUSAN GAFFNEY, ED ELLIS, JIM GARDNER, JOHN DEGNAN, ED SPELL, SYLVESTER GREEN, AARON GOLDSTEIN, defendants: CHRISTINE A. AMALFE, GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, PC, NEWARK, NJ.

JUDGES:
GARRETT E. BROWN, JR., U.S.D.J.

OPINION BY:
GARRETT E. BROWN, JR.

OPINION:

MEMORANDUM OPINION

BROWN, District Judge

This matter comes before the Court upon the motion of the plaintiff, Marie N. Jackson, for reargument of the Court's Memorandum Opinion and Order entered on September 5, 2000, which granted in part the defendants' partial motion to dismiss, and reargument of the Court's Memorandum Opinion and Order entered on December 5, 2000, which affirmed an order entered by the Honorable Freda L. Wolfson, U.S.M.J.; and upon the conditional cross-motion of the defendants' for partial summary judgment; and upon the motion of the defendants for summary judgment on the plaintiff's remaining claims. The Court has jurisdiction over this action pursuant to *28 U.S.C. § 1331* and supplemental jurisdiction over the state law claims pursuant to *28 U.S.C. § 1367*. For the reasons discussed in this Memorandum Opinion, the plaintiff's motion for reargument is denied, the defendants' conditional cross-motion for partial summary judgment is dismissed as moot, and the defendants' motion for summary judgment is granted.

I. PROCEDURAL HISTORY

In September 1998, the plaintiff filed a complaint in this Court alleging employment discrimination at the hands of the defendants on the basis of her race, gender and age. The plaintiff's claims initially were based on a various aspects of federal constitutional and statutory law, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United Sates Constitution as well as the Constitution's Thirteenth Amendment, and supplemental state law claims. Thereafter, the plaintiff filed four amendments to the complaint. n1

On May 7, 1999, the defendant Chubb Corp. moved to dismiss the claims asserted against it on the grounds that the plaintiff was never employed by that entity, which was the

parent company of the plaintiff's employer, Chubb & Sons, and on the grounds that the plaintiff had failed to demonstrate that Chubb Corp. controlled or dominated the day-to-day operations of Chubb & Sons to such an extent that the plaintiff could "pierce the corporate veil" and hold the parent liable for the alleged wrongful acts of its subsidiary. By Memorandum Opinion and Order dated August 16, 1999, the Court granted the defendant's motion and dismissed all claims asserted against Chubb Corp. The plaintiff then filed a "motion to stay, for amendment and/or reargument and/or reconsideration," in which the plaintiff alleged, without any factual support, that the defendants committed a "fraud on the Court." The Court denied the plaintiff's baseless motion by Memorandum Opinion and Order dated October 13, 1999. Simultaneously, the plaintiff filed an improvident notice of appeal to the United States Court of Appeals for Third Circuit, which the court dismissed for lack of jurisdiction on or about May 18, 2000. Thereafter, the plaintiff filed a motion for certification of the Court's August 16, 1999 Order as a final appealable order pursuant to Fed. R. Civ. P. 54(b), which the Court denied by Memorandum Opinion and Order dated November 15, 1999.

After extensive pre-trial proceedings and discovery, including two appeals from Judge Wolfson's discovery orders, which were denied, the defendants moved to dismiss certain of the plaintiff's claims alleged in the Third Amended Complaint on various grounds including statute of limitations. Soon thereafter the plaintiff dismissed her attorney and retained new counsel, who opted to rely on prior counsel's brief filed in opposition to the defendants' motion. By Memorandum Opinion and Order dated September 1, 2000, the Court granted in part and denied in part the defendants' motion. In the portion of the Memorandum Opinion most relevant to the issues presently before the Court, the Court dismissed as time-barred some of the plaintiff's claims brought under the New Jersey Law Against Discrimination ("NJLAD"). Relying on *Montells v. Haynes, 133 N.J. 282, 292, 627 A.2d 654, 659-60 (1993)*, the Court applied New Jersey's two-year statute of limitations to her NJLAD claims. The Court concluded that "the

operative facts arose in and after 1994 and, therefore, the two-year statute of limitations applies to the plaintiff's NJLAD . . . claims." September 1, 2000 Memorandum Opinion at 14.

After the Court's September 1, 2000 decision, the plaintiffs' remaining claims alleged discrimination on account of her race, sex and age in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e, et seq.* ("Title VII"), the Age Discrimination in Employment Act, *29 U.S.C. § 623*(a)(1) ("ADEA"), NJLAD, the New York Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 2000) ("NYHRL"), and the Employee Retirement Income Security Act of 1974, *29 U.S.C. § 1001, et seq.* ("ERISA"). Additionally, the plaintiff asserts a cause of action for retaliation in violation of Title VII, the Civil Rights Act of 1866, *42 U.S.C. § 1981* ("§ 1981") and NJLAD. *See* Third Amended Complaint at Count IV.

On October 13, 2000, the defendants filed the motion for summary judgment now pending before the Court. During the pendency of the defendants' motion, the plaintiff filed an appeal of a discovery order entered by Judge Wolfson, which the Court denied by Memorandum Opinion and Order dated December 4, 2000. After some difficulty in scheduling arguments on the defendants' motion, the Court heard the arguments of counsel on December 4, 2000. On December 12, 2000, after the Court heard the arguments of counsel but before rendering a decision on the defendants' motion for summary judgment, the plaintiff filed a motion for reconsideration of the Court's September 1, 2000 Order dismissing some of her NJLAD claims and further sought reconsideration of the Court's December 5, 2000 Order affirming Judge Wolfson's discovery order. In light of the issues raised in the plaintiff's motion, the Court held in abeyance any decision on the defendants' motion for summary judgment.

In her motion for reargument, the plaintiff sought additional discovery that she claimed impacted her claims. According to the plaintiff, the New Jersey Supreme Court's November 2000 decision in *Ali v. Rutgers, 166 N.J. 280, 765 A.2d 714 (2000)*, announced a new rule of law with respect

to the applicable statute of limitations in NJLAD cases, and that under this new rule, the Court should apply a six-year rather than a two-year statute of limitations to the plaintiff's NJLAD claims. The plaintiff also argued that the *Ali* decision somehow impacts the Court's December 5, 2000 decision affirming Judge Wolfson's discovery order. In response to the plaintiff's motion, the defendants filed a conditional cross-motion for summary judgment seeking dismissal of the plaintiff's NJLAD claims should the Court reinstate those claims. After some additional scheduling difficulties between the parties, the Court heard the arguments of counsel on the plaintiff's motion for reargument-on February 20, 2001. The parties motions are now ripe for disposition.

II. BACKGROUND

The plaintiff began her employment with Chubb in February 1989 in Chubb's Home Office located in Warren, New Jersey, as a Home Office Examiner dealing primarily with Directors and Officers claims ("D&O"). *See* Defendants' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 ("Defendants' Rule 56.1 Statement") at PP 2-3. The plaintiff was supervised first by Carol Noer and then in October 1989, Jeff King. *See* Plaintiffs Statement of Material Facts Pursuant to Local Civil Rule 56.1 ("Plaintiff's Rule 56.1 Statement") at P 6. At the time of her hire, the plaintiff did not have any-experience in D&O litigation or insurance coverage, but had been employed as an associate at a law firm in New Jersey handling various types of litigation, including insurance litigation involving health care. *See* Defendants' Rule 56.1 Statement at P 4; Plaintiff's Rule 56.1 Statement at P 4; Certification of Marie N. Jackson ("Jackson Cert.") at P 5. At the time of her hire at Chubb, Ms. Jackson was the first and only African-American employee in Chubb's How Office, D&O Claims Department. *See* Plaintiff's Rule 56.1 Statement at P 7.

Chubb divided its D&O claims according to geographical Zones and the Zone's activities are monitored by the Home Office, where the plaintiff was employed in 1989. *See* Defendants' Rule 56.1 Statement at P 6-7; Plaintiff's Rule 56.1

Statement at P 6. The Zonal Claim Examiners–which plaintiff was not–were responsible for the day-to-day monitoring of claims. *See* Defendants' Rule 56.1 Statement at P 8. Among their duties, the Zonal Claims Examiners must contact an insured and review the relevant policy in order to determine whether a claim is covered for defense and/or indemnity costs; must determine what reserves must be set by the company to cover any potential losses; and must supervise and consult with the insured and its outside counsel on litigation strategy. *See id.* at PP 9-11. Home Office Examiners, like the plaintiff, monitored and provided technical support to the Zonal Examiners. *See id.* at P 12-13. In 1994, Chubb implemented a computer workstation system through which Zonal and Home Office Claims Examiners could monitor individual claims through an automated system that required the examiners assigned to those claims periodically to update. *See id.* at P 15-17.

Chubb used "Audit Guidelines," which provided the procedures that employees in its D&O Department had to follow when managing claims. *See id.* at P 19. Among other things, the Audit Guidelines provided that: i) coverage must be analyzed and a written explanation provided to the insured within 30 days of a Claims Examiner's receipt of a new claim or the D&O Examiner must document in the workstation the reason or reasons why a coverage position cannot be taken; ii) each D&O Claims Examiner was responsible for the preparation of a D&O Memo for each new claim, which was to be completed within 90 days of receipt of the claim, and updated as significant new information became available or, at a minimum, every 90 days; iii) the Claims Examiner was to include in the D&O Memo such information as the arguments of parties in the litigation, an analysis of coverage, an allocation of reserves, and a strategy for future handling; iv) for cases with an estimated value of less than $ 100,000 in either expense or indemnity/loss, reserves for the case life must be set within 90 days of the Loss Reported Date, if it is expected that case life expenses will exceed $ 100,000, then a zero reserve should be set within 90 days with the case life expense reserve set within six months from the Loss Reported Date. *See id.* at PP 20-25.

An Examiner's compliance with the Audit Guidelines was reflected in his or her performance goals and was one criteria on which an Examiner's performance was evaluated by supervisors. *See id.* at P 26.

In late 1994 Chubb underwent an company-wide reorganization, the relevant portion of which sent all Home Office Examiners to the Zones. *See id.* at P 27. Plaintiff was offered, and she accepted, a position in the New York Zone office, which was located in New York City. *See id.* at P 28. Plaintiff's pay grade and settlement authority remained the same in New York, and she began reporting to Ed Ellis. *See id.* at PP 30-32. Once in New York as a Zonal Claims Examiner, as opposed to a Home Office Claims Examiner, the plaintiff assumed direct responsibility for the day-to-day handling of claims. *See id.* at P 34.

In 1994, Chubb implemented a performance appraisal system based on descriptive ratings of an employee's attainment of performance goals. *See id.* at 40. Under this system, employees were given an overall rating of either "Exceeded All," "Exceeded Some," "Met All," "Met Most," "Met Some," or "Did Not Meet" their goals. *See id.* In 1994, the plaintiff received an overall rating of "Met Most" of her performance goals for that year. *See id.* at P 39. Ellis also completed the plaintiff's performance plan for the following year, the attainment of which would determine in part her 1995 appraisal. *See id.* at P 43.

These performance goals were divided between "Customer Service" goals, "Financial Management" goals, and "Case Management" goals. *See id.* at PP 43-45.

Ellis set the following 1995 Customer Service performance goals for plaintiff:

. Ensure timely service and accurate flow of information to customers;

. Initiate phone contact within 24 hours of receipt of new claim to insured/agent. Request acknowledgment letter to

insured within 24 hours and issue same within 72 hours, with copies sent to broker and underwriter;

. Request and conduct in person meetings with the insured, broker and defense counsel within 30 days, in complex and possible high exposure cases or when needed. At these meetings, discuss claim handling, policy/coverage issues, obtain factual and documentary information. Complete trip report within two weeks with copies to file, manager, supervisor and the Home Office, if appropriate;

. Analyze and document applicable policy provisions, coverage analysis and underwriting intent. Prepare all coverage letters within 30 days of Loss Reported Date;

. Prepare fully, within 90 days, D&O memos or negotiations sheets on all files. This would include facts and/or arguments of parties, analysis of coverage, liability, damages, allocation, reserve rationale and recommendations, strategy/agenda and recommendations for future handling. Update D&O memos or negotiation sheets regarding substantive events, but at least every 90 days.

See id. at P 43.

Ellis set the following 1995 Financial Management goals for the plaintiff:

. Ensure timely and accurate reserving of cases;

. Conduct prompt investigation of all claims to develop facts, including liability and damage analysis, in order to timely and accurately set case life reserves;

. Post reserves within 90 days of Loss Reported Date, using proper coding;

. Reserve all files for case life in accordance with the following: expense and loss reserves less than $ 100,000 within 90 days; expense reserves above $ 100,000 within 6 months, loss reserves above $ 100,000 as soon as possible;

. Clearly and thoroughly document expense rationale. Include liability and damage analysis for loss reserve and analysis of case life budget for expense reserve in all files;

. Re-evaluate reserves on a regular basis (at least every 90 days) and document decision and thought process.

See id. at P 44.

Ellis set the following 1995 Case Management goals for the plaintiff:

. Document all factual and coverage analysis, discussions, liability and damage analysis. Strategy or agenda and committee results in file. Also, documentation should clearly reflect actions taken to implement strategy or agenda;

. Maintain all cases on an appropriate diary system and document activities/actions taken on each diary date. Revise strategy/agenda as appropriate and document the revisions.

See id. at P 45.

In February 1996, Ellis evaluated the plaintiff's performance for 1995. *See id.* at P 48. Plaintiff's overall performance evaluation indicated that her performance was satisfactory, but there were specific instances of deficiencies. *See id.* at P 48. For example, in the Financial Management area the plaintiff received a rating of "Met Some" because she failed consistently to set loss reserves in a timely manner. *See id.* at P 49. Additionally, Ellis noted that the plaintiff failed to use the workstation diary to document activity in her cases. *See id.* at P 50.

Soon after the plaintiff's first review as a Zonal Claims Examiner, it was discovered that there were no reserves set in a number of the plaintiff's cases within the 90-day time period as required by the Audit Guidelines and, therefore, Susan Gaffney, who had been appointed Regional Specialty Manager, instructed Ellis to review the plaintiff's files. *See id.* at P 56-57. Ellis referred to this review as a "Mini-Audit." *See id.* at P 58. Ellis set forth the results of this Mini-Audit in a

memorandum to plaintiff dated July 27, 1996. *See id.* Ellis noted the following deficiencies discovered during the review of the plaintiff's files: i) 25 of the 71 claims files the plaintiff was handling needed some level of updated information on the workstation diary; ii) some of the physical files needed additional documentation; iii) certain files needed updating by July 19, 1996; and iv) two additional of the plaintiff's cases did not have reserves set within the 90-day period. *See id.* at PP 59-64. Ellis met with the plaintiff and a representative from the Human Resources Department on July 19, 1996 and reviewed with the plaintiff the deficiencies uncovered by his Mini-Audit. *See id.* at PP 69-70.

In the Fall of 1996, Ellis transferred to another department at Chubb and had no further contact with the plaintiff. *See id.* at P 72-74. Upon Ellis's transfer, Susan Gaffney assumed supervisory responsibility over the plaintiff. *See id.* at P 73. The New York Specialty Claims Manager position vacated by Ellis was filled by Ron Goldstein, who prior to that was a Zonal D&O Supervisor. *See id.* at P 75. Goldstein's vacated position was filled by James Sharkey, who, like the plaintiff, was a D&O Examiner working in New York at the time. *See id.* at P 76. According to the plaintiff's supervisor, Susan Gaffney, the plaintiff was not considered for either of these supervisory positions because of the performance deficiencies noted in the Ellis Mini-Audit, and would not be considered for promotion until she cured the noted deficiencies. *See id.* at PP 77-78.

As part of her responsibilities as Regional Manager, Gaffney was to ensure that a "Claims Competency Assessment" was conducted for each employee under her supervision. *See id.* at P 80. The assessment was used by management to identify an employee's proficiency level in certain specific areas. *See id.* at P 81. Typically, an employee was actively involved in the process and it was in that forum that employees with their supervisors would set and discuss career goals at Chubb. *See id.* at P 82. On or about September 23, 1996, Gaffney met with the plaintiff in order to review the Claims Competency Assessment. *See id.* at P 85. On September 27, 1996, Gaffney sent a memorandum to Mike Marinaro in the Human Resources Department, about her

meeting with the plaintiff, which indicated that the plaintiff was unwilling to participate in the assessment. *See* Declaration of Susan Gaffney in Support of Defendants' Motion for Summary Judgment at Exh. F.

In early October 1996, Gaffney gave the plaintiff the option of remaining in New York or transferring to Eastern Zone Office in New Jersey. *See* Defendants' Rule 56.1 Statement at PP 104-05. On or about October 31, 1996, the plaintiff elected to move to the Eastern Zone Office in New Jersey to commence work on December 2, 1996. *See id.* PP 106-07.

At about the time the plaintiff transferred to New Jersey, Gaffney discovered that the plaintiff had failed in several instances to issue coverage letters in a timely manner to insureds. *See id.* at P 111. Gaffney brought the deficiency to the plaintiff's attention orally and by memorandum dated December 3, 1996. *See* Gaffney Decl. at P 112.

In February 1997, the plaintiff sent to Gaffney a memorandum in which she complained about discrimination she suffered at Chubb, and informed Gaffney that she had been saddled with an unreasonable workload and had been unfairly criticized for her performance. *See id.* at P 116.

In March 1997, Gaffney gave the plaintiff her 1996 performance review along with an "Initial Warning" notifying the plaintiff that she had not met performance goals. *See id.* at P 121. At the time, Gaffney notified the plaintiff that she would be given 45 days to improve on the noted deficiencies at which time her performance would be reassessed. *See id.* at P 125. After the 45-day period, Gaffney reviewed 56 of the plaintiff's files, and noted the following deficiencies: i) in 31 files the plaintiff had overdue coverage letters; ii) in 11 files she had overdue D&O memos; iii) in five files late reserves had been set; iv) in 25 files the plaintiff had incomplete documentation on litigation strategy; v) in two files the plaintiff had incomplete reserve analysis; vi) in 12 files plaintiff had inadequate documentation on reserves; vii) in four files Gaffney noted overdue responses called for by Gaffney inquiries; and viii) in one file Gaffney found that the plaintiff failed to timely pay attorneys fees. *See id.* at P 128.

On May 1, 1997, Gaffney met with the plaintiff again to discuss her performance and, having concluded that the plaintiff had not made any noticeable improvement, issued to the plaintiff a final "Written Warning." *See id.* at PP 129-30. Days after issuing the final written warning, Gaffney received from John Baley, a Claims Counsel in the Home Office, a memorandum indicating that the plaintiff had mismanaged a claim almost costing Chubb several hundred thousand dollars. *See id.* at P 137. This error related to the plaintiff's failure properly to document the claim file. *See id.* Gaffney concluded that the plaintiff's performance had not improved and that the plaintiff refused to acknowledge the noted deficiencies. *See id.* at PP 138-39. On June 20, 1997, Gaffney advised the plaintiff that she was terminated due to unsatisfactory performance. *See id.* at P 140.

III. DISCUSSION

The Court will first address the plaintiff's motion for reargument and then turn to the defendants' motion for summary.

A. PLAINTIFF'S MOTION FOR REARGUMENT

The plaintiff seeks reconsideration of two orders of the Court. First, the plaintiff argues that the portion of the Court's September 1, 2000 Memorandum Opinion applying a two-year statute of limitations to the plaintiff's NJLAD claims is legally incorrect in light of an intervening change in the law. Second, the plaintiff seeks reconsideration of the Court's December 5, 2000 Memorandum Opinion and Order affirming Judge Wolfson's discovery order, both because the plaintiff claims to have timely filed her appeal of Judge Wolfson's order, and because the intervening change in the law entitles the plaintiff to additional discovery. The plaintiff's motion is without merit on both scores.

1. *Standard for Reargument*

Local Civil Rule 7.1(g) governs motions for reconsideration. *See Bowers v. National Collegiate Athletic Ass'n, 130 F. Supp. 2d 610, 612, 2001 WL 91626,* *2 (D.N.J. 2001). The Local Rule requires a motion for reargument to be

served and filed within ten days of the entry of judgment. *See* Local Civil Rule 7.1(g). The rule further specifies that a separate brief shall be filed "setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked." *See id.*

The standard for reargument is high and reconsideration is to be granted only sparingly. *See United States v. Jones, 158 F.R.D. 309, 314 (D.N.J. 1994).* The Court will grant a motion for reconsideration only where its prior decision has overlooked a factual or legal issue that may alter the disposition of the matter. *See Pelham v. United States, 661 F. Supp. 1063, 1065 (D.N.J. 1987); Maldonado v. Lucca, 636 F. Supp. 621, 630 (D.N.J. 1986); see also* L.Civ.R. 7.1(g). "The word 'overlooked' is the operative term in the Rule." *Bowers, 130 F. Supp. 2d 610 at 612, 2001 WL 91626* at *2 (citing Allyn Z. Lite, New Jersey Federal Practice Rules at 30 (Gann 2001)). Reconsideration is not available for a party seeking merely to reargue matters already addressed by the Court. *See Egloff v. New Jersey Air Nat'l Guard, 684 F. Supp. 1275, 1279 (D.N.J. 1988).* Therefore, a motion that merely raises disagreement with the Court's initial decision is not an appropriate reconsideration motion, but should be dealt with in the normal appellate process. *See Bowers, 130 F. Supp. 2d 610 at 612, 2001 WL 91626* at *2 (citations omitted); Florham *Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988).* In other words, "[a] motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple." *Tishcio. v. Bontex, Inc., 16 F. Supp. 2d 511, 533 (D.N.J. 1998).* Additionally, reconsideration is not to be used as a means of expanding the record to include matters not originally before the Court, *see Bowers, 130 F. Supp. 2d 610 at 612, 2001 WL 91626* at *2 (citations omitted); *Resorts Int'l v. Greate Bay Hotel and Casino, Inc., 830 F. Supp. 826, 831 (D.N.J. 1992),* and a party seeking to introduce new evidence on reconsideration bears the burden of first demonstrating that evidence was unavailable or unknown at the time of the original hearing. *See Levinson v. Regal Ware, Inc., 1989 U.S. Dist. LEXIS 18373, Civ. No. 89-1298, 1989 WL 205724* at *3 (D.N.J. Dec. 1, 1989).

2. *The Plaintiff's Motion for Reargument*

The plaintiff argues that she is not bound by the ten-day period within which a party must move for reargument under L.Civ.R. 7.1(g), or the high standard for reargument because the New Jersey Supreme Court's *Ali* decision announced a new rule of law. Thus, the plaintiff argues, the Court can amend its decision pursuant to Fed. R. Civ. P. 54(b) at any time prior to the entry of final judgment. The plaintiff's argument is without merit because *Ali* is not applicable to the plaintiff's NJLAD claims asserted here.

In *Ali*, the court addressed whether the two-year post-*Montells* or the six-year pre-*Montells* statute of limitations applied to NJLAD claims where the "operative facts" arose both before and after the court issued that decision. *See Ali, 166 N.J. at 285; 765 A.2d at 717.* In that case, the plaintiff was hired in 1981 as the "Director" of the Paul Robeson Cultural Center at Rutgers University. *See 166 N.J. at 282; 765 A.2d at 715.* Eleven years later in 1992, the plaintiff learned that the defendant never regarded him as the Director but, rather, as the "Administrator" of the center, and ten-months later hired a new Director to whom the plaintiff reported. *See 166 N.J. at 283; 765 A.2d at 715.* The plaintiff alleged that defendant's conduct was race-based discrimination in violation of NJLAD. *See id.* According to the plaintiff in that case, the act of hiring the plaintiff in 1981 as the Director of the center and later disavowing his title was discriminatory. Thus, the plaintiff's 1981 hiring was an "operative fact." Applying the court's prior decision in *Montells*, the *Ali* Court found that the defendant hiring the plaintiff in 1981 as the Director of the center was an operative fact that brought the plaintiff's NJLAD cause of action within the pre-*Montells* six-year limitations period.

The *Ali* decision is not applicable to the NJLAD claims asserted here because there are no such "operative facts" alleged here occurring pre-*Montells* that would bring this case under the rule announced in that case. In its September 1, 2000 Memorandum Opinion the Court found that "the operative facts arose in and after 1994 and, therefore, the two-year statute of limitations applies to the plaintiff's NJLAD

. . . claims." September 1, 2000 Memorandum Opinion at 14. Plaintiff failed to seek reconsideration of that decision within ten days of its entry as required by L.Civ.R. 7.1(g). The only conceivable "operative facts" occurring pre-*Montells* alleged in the Third Amendment Complaint are contained in paragraph 43, where the plaintiff alleges

> On or about 1993, Brian Kirstiansen was promoted to the position of Supervisor of the Home Office D&O Claims Examiner. While Plaintiff was in [the] Home Office, Brian Kirstiansen, Maggie Klimczyk, Eric Schall, Jim Carson and Don Wroblewski were selected for special assignments, projects, training, interaction with other departments to advance their careers. Plaintiff was not provided the same benefits at Chubb irrespective of the promises made that she would be treated fairly and equally.

Third Amended Complaint at P 43. The plaintiff, however, does not allege a cause of action based on these facts but, rather, offers them as "backdrop" evidence demonstrating a "pattern of discrimination." Plaintiff seems to be arguing that "Ms. Jackson's Third Amended Complaint alleges that she was subjected to a continuing pattern of discrimination and disparate treatment from October 1989 when she began working under Jeff King up to her termination from Chubb in June 1997." Plaintiff's Brief in Support of Motion Seeking Reconsideration at 10. This Court, however, already rejected the plaintiff's "continuous wrong" argument made in opposition to the defendants' motion to dismiss. *See* September 1, 2000 Memorandum Opinion at 12-13. *Ali* does not give plaintiff grounds to reargue this issue because that case does not pertain to cases where the plaintiff has alleged a continuous pattern of discrimination. The *Ali* Court expressly stated that "nothing in this opinion is intended to alter our existing jurisprudence" regarding continuing violations. *See Ali, 166 N.J. at 286; 765 A.2d at 717.* Therefore, the New Jersey Supreme Court's *Ali* decision provides no basis for the plaintiff's motion.

The Court's December 5, 2000 Order affirming Judge Wolfson's discovery order was based on alternative grounds:

that the plaintiff failed to appeal the decision within ten days of entry and on the grounds that Judge Wolfson's decision was not clearly erroneous. To the extent that plaintiff seeks reconsideration of that decision on the grounds that *Ali* entitles the plaintiff to additional discovery, the plaintiff's motion is denied for the reasons discussed above. The plaintiff also argues that she timely filed her appeal, but that the clerk's office "misplaced" the plaintiff's original papers when they were originally filed. The plaintiff's motion is without merit. The time limitation provided in L.Civ.R. 72.1(c)(1)(A) runs when the appeal is filed. Here, the plaintiff did not file her appeal until November 13, 2000–seven days beyond the ten-day limitation. The plaintiff claims, without any support whatsoever, that she actually "filed" the appeal on November 3, 2000 and offers as support a Federal Express invoice indicating that Federal Express picked-up a package at plaintiff's counsel's office on November 2, 2000 for delivery to the Clerk of the Court. *See* Certification Of James K. Haney at Exhibit A. This invoice, however, does not show that the plaintiff timely filed her appeal. The Court's records indicate that the appeal was filed on November 13, 2000 and the plaintiff has provided no proof that the records are wrong. Typically, litigants obtain a "file stamp" copy from the Clerks' Office at the time of filing as proof that the document was filed. The plaintiff has not provided the Court with any such document, and there is nothing before the Court that supports plaintiff's claim that she timely filed her appeal.

Accordingly, the plaintiff's motion for reconsideration of the Court's September 1, 2000 and December 5, 2000 decisions is denied and, therefore, the Court need not reach the merits of the defendants' conditional cross-motion for summary judgment and that motion is dismissed as moot.

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Court will first address the plaintiff's claim of race, sex and age discrimination, then address the plaintiff's claim of retaliation, claims against two individual defendants, and ERISA claims.

1. *Standard for Summary Judgment*

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir.1996); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1219, n. 3 (3d Cir.1988), cert. denied, 490 U.S. 1098, 104 L. Ed. 2d 1004, 109 S. Ct. 2449 (1989); Hersh v. Allen Prod. Co., 789 F.2d 230, 232 (3d Cir.1986).*

In deciding whether there is a disputed issue of material fact, the Court must view the underlying facts and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir.1995); Hancock Indus. v. Schaeffer, 811 F.2d 225, 231 (3d Cir.1987).* The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor).

In deciding whether triable issues of fact exist, Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). The rule does not increase or decrease a party's ultimate burden of proof on a claim. Rather, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson, 477 U.S. at 255-56.*

Under the rule, a movant must be awarded summary judgment on all properly supported issues identified in its motion, except those for which the non-moving party has provided evidence to show that a question of material fact remains. *See Celotex, 477 U.S. at 324.* Put another way, once the moving party has properly supported its showing of no triable issue of fact and of an entitlement to judgment as a matter of law, for example, with affidavits, which may be "supplemented . . . by depositions, answers to interrogatories, or further affidavits," *id.*, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita, 475 U.S. at 586; see also Anderson, 477 U.S. at 247-48* ("by its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion . . . the requirement is that there be no genuine issue of material fact.").

What the non-moving party must do is "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex, 477 U.S. at 324; see also Lujan v. National Wildlife Fed., 497 U.S. 871, 888, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)* ("the object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit"); *Anderson, 477 U.S. at 249; Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir.1992)* ("to raise a genuine issue of material fact . . . the [non-moving party] need not match, item for item, each piece of evidence proffered by the movant," but rather must exceed the 'mere scintilla' threshold"), *cert. denied, 507 U.S. 912, 122 L. Ed. 2d 659, 113 S. Ct. 1262 (1993).* Under Rule 56(e), "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial' mandates the entry of summary judgment." *Watson v. Eastman Kodak Co., 235 F.3d 851, 858 (3d Cir. 2000)* (quoting *Celotex, 477 U.S. at 322*; citing *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990)).*

Plaintiff's statement that "summary judgment is considered to be a drastic remedy" is not an accurate statement of current federal procedural law. *See* 10A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure: Civil 2d, § 2712 at 215-19 (West 1998).

2. *Plaintiff's Discrimination Claims*

As noted above, the plaintiff asserts causes of action under Title VII, the ADEA, NJLAD and NYHRL based on unlawful discrimination on account of her race, sex and age. The plaintiff alleges that the discrimination at Chubb infected the alleged failure to promote the plaintiff in three instances: i) the June 1996 promotion of Mary Elliot to the position of Claims Counsel in the Corporate Liability Unit; ii) the December 1996 promotion of Aaron Goldstein to the position of Specialty Claims Manager; and iii) the February 1997 promotion of James Sharkey to D&O Supervisor. Additionally, the plaintiff alleges that the 1997 termination of her employment at Chubb was discriminatory.

On a motion for summary judgment, the Court must analyze each of the plaintiff's remaining claims under the oft-stated burden shifting framework adopted for Title VII cases as set forth by the United States Supreme Court in *McDonnell Douglas v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)* and *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)* as modified by *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). See Iadimarco v. Runyon, 190 F.3d 151 (3d Cir. 1999)* (applying *McDonnell Douglas* framework to race discrimination claims under Title VII); *Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 82, 389 A.2d 465, 479 (1981)* (applying *McDonnell Douglas* framework to NJLAD

claims); *Barber v. CSX Distribution Servs., 68 F.3d 694, 698 (3d Cir. 1995)* (applying *McDonnell Douglas* framework to ADEA claims alleging age discrimination); *Miller Brewing Co. v. State Div. Of Human Rights, 66 N.Y.2d 937, 498 N.Y.S.2d 776, 778, 489 N.E.2d 745 (N.Y. 1985)* (applying *McDonnell Douglas* framework to NYHRL claim).

Under the *McDonnell Douglas/Burdine* framework, the plaintiff must first prove a *prima facie* case of discrimination by a preponderance of evidence. *See Burdine, 450 U.S. at 252-53* (quoting *McDonnell Douglas, 411 U.S. at 802).* To make her prima facie case on the promotions, the plaintiff must prove i) that Jackson belongs to a protected class; ii) that she applied and was qualified for the promotions; iii) that despite her qualifications she was rejected; and iv) that the defendants ultimately filled the position or continued to seek applicants from candidates sufficiently younger than the plaintiff, for her age discrimination claims, or otherwise show that the employer continued to seek employees to fill the position she sought. *See Barber, 68 F.3d at 698* (citing *Fowle v. C & C Cola, 868 F.2d 59, 61 (3d Cir. 1989)).* In *Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999),* the court held that in a termination case, under the fourth element of the *McDonnell Douglas* prima facie case a plaintiff need not show that she was replaced by someone outside of her protected class. *See id. at 355.* The *Pivirotto* Court reasoned that "a plaintiff's inability to prove that she was replaced by someone outside of her protected class is not necessarily inconsistent with her demonstrating that the employer treated her less favorably than others because of [her] race . . .." *191 F.3d at 353* (citing *Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978))* (internal quotation marks omitted and alteration in original). Thus, after, *Pivirotto*, it appears that the plaintiff need no longer demonstrate that the positions she sought were filled by employees outside of her protected class. On her wrongful termination claim, the plaintiff must come forward with evidence showing i) that she was qualified for the position of Zonal Claims Examiner; and ii) that she was terminated despite her qualifications. *See id.*

Once established, the plaintiff's prima facie case creates a rebuttable presumption of discriminatory intent. *See Hicks, 509 U.S. at 506; Burdine, 450 U.S. at 254.* While the ultimate burden of proof always remains with the plaintiff, the burden of production now shifts to the defendants, who must articulate a legitimate, nondiscriminatory reason for their actions. *See Hicks, 509 U.S. at 507; Burdine, 450 U.S. at 254; McDonnell Douglas, 411 U.S. at 802.* To satisfy their burden, the defendants must come forward with admissible evidence supporting the nondiscriminatory reason or reasons for their actions. *See Burdine, 450 U.S. at 255.* "The *McDonnell Douglas* formula is grounded in the presumption that if a rational reason for disparate treatment is not forthcoming, it is more likely than not that illegal discrimination played a role in the [adverse] decision." *Chauhan v. Alfieri Co., 897 F.2d 123 at 127* (citations omitted). Once the defendants satisfy their burden, the presumption of discriminatory intent is rebutted and drops from the case. *Id.*

The burden of production then shifts back to the plaintiff, who must come forward with evidence showing that the defendants' articulated nondiscriminatory reasons were not the true reasons for the adverse action, but merely a "pretext for discrimination." *McDonnell Douglas, 411 U.S. at 802; Hicks, 509 U.S. at 507-08; Burdine, 450 U.S. at 253.* "[A] plaintiff does not need direct evidence of pretext in order to survive summary judgment." *Chauhan, 897 F.2d at 127* (citing *Chipollini v. Spencer Gifts, Inc., 814 F.2d 893* (3d Cir.), *cert. dismissed, 483 U.S. 1052 (1987)).* "Instead, a plaintiff needs to be able to 'point[] to evidence which calls into question the defendant's intent.'" *Id.* (quoting *Chipollini, 814 F.2d at 899).* To create a factual dispute as to pretext, the plaintiff must not only produce evidence that she was qualified for the promotions she sought and qualified to remain an employee at Chubb, but also must come forward with evidence that casts doubt on the defendants' proffered nondiscriminatory reasons for promoting the other employees and for terminating the plaintiff. *See Chauhan, 897 F.2d at 127* (quoting *Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988), cert. denied, 490 U.S.*

1098, 104 L. Ed. 2d 1004, 109 S. Ct. 2449 (1989)). "In sum, the plaintiff cannot rely solely on a potential finding that the defendants' explanation is implausible. The fact that a judge or a jury might disbelieve the defendants' asserted nondiscriminatory reason is not enough, by itself, to preclude summary judgment. Rather, the plaintiff must be able to adduce evidence, whether direct or circumstantial, from which a reasonable jury could conclude that the defendants' explanation is incredible." *Id.* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Williams v. Borough of Westchester, 891 F.2d 458, 459-61 (3d Cir. 1989))*.

a) Plaintiff's *prima facie* case.

The defendants argue that the plaintiff cannot make out a *prima facie* case of discrimination. The plaintiff, on the other hand, argues that she was qualified for the promotions she sought and that she also was qualified for the position of Zonal Claims Examiner from which she terminated.

i. Failure to promote claim.

As noted above, to make out a prima facie case on the discriminatory promotions claim, the plaintiff must prove i) that she belongs to a protected class; ii) that she applied and was qualified for the promotions; iii) that despite her qualifications she was rejected; and iv) on her age claim that the defendants ultimately filled the position or continued to seek applicants from candidates sufficiently younger than the plaintiff to support an inference of discrimination, and on her race and gender claims that the defendants continued to seek applicants or hired someone with the plaintiff's qualifications. *See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)*.

There is no dispute that the plaintiff, an African-American woman over 40 years of age, was a member of the protected classes. Nor is there a dispute that she was denied the promotions. Thus, the Court's inquiry must focus on whether the plaintiff has come forward with evidence that she applied and was qualified for the promotions.

Under the *McDonnell Douglas/Burdine* framework in a failure to hire or failure to promote case, a plaintiff must

come forward with evidence that she applied for a promotion or position and was denied the promotion or position by her employer. *See Brown v. Coach Stores, Inc., 163 F.3d 706, 710 (2d Cir. 1998).* It will not suffice for a plaintiff to merely show that she expressed to her supervisor a general desire for promotion. *See id.* Additionally, "while more than a denial of promotion as a result of a dispute over qualifications must be shown to provide pretext, . . . such a dispute will satisfy the plaintiff's *prima facie* hurdle of establishing qualification as long as the plaintiff demonstrates that she was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made." *Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1993)* (citations omitted). The Court, however, need not consider whether the plaintiff was qualified for the position of Claims Counsel in the Corporate Liability Unit filled by Mary Elliot in June 1996, the position of Specialty Claims Manager filled by Aaron Goldstein in December 1996, or the position of D&O Supervisor filled by James Sharkey in February 1997, because the plaintiff has failed to come forward with evidence from which a finder of fact could conclude that the plaintiff ever applied for those positions.

Here, although the defendants point out clearly in their moving papers that the plaintiff failed to apply for the three promotions, *see* Defendants' Brief at 25-26 and 28-29, the plaintiff's brief submitted in opposition to the defendants' motion is silent on whether the plaintiff ever applied, either formally or informally, for the three promotions she allegedly was denied. *See* Plaintiff's Brief at 26-41. Upon the Court's own review of the plaintiff's submissions, the plaintiff appears to argue that Chubb does not have a formal job posting system and that employees are made aware of available positions only through a "word-of-mouth" system. *See* Plaintiff's Rule 56.1 Statement at PP 14 and 20. Although the plaintiff does not state the relevance of this allegation, she appears to be arguing by inference that there was no mechanism through which she could have applied and, therefore, should be relieved of the burden of coming forward with evidence that she applied or the positions. The Court, however, must reject the plaintiff's argument because

the evidence plaintiff cites in her Rule 56.1 Statement does not support the proposition for which it is cited. The plaintiff cites three portions of deposition testimony in support of her characterization of Chubb's system whereby employees can apply for positions within the company. First, the plaintiff cites the deposition testimony of Doris Johnson at page 58, Attached to the Affidavit of Ann Yonker at Exhibit J. Ms. Johnson's deposition testimony, however, says nothing about a "word-of-mouth" system but, rather, states that the application process would "differ" and that sometimes employees were solicited for particular positions. The plaintiff also cites to the deposition testimony of Mary Elliot at pages 21 and 31, attached to the Affidavit of Ann Yonker at Exhibit K. In that portion of her testimony, Ms. Elliot was testifying about a particular job opening at Chubb in California in 1995, *see* Eliot Tr. at 20-21, and later testified about how she learned of an opening for the Claims Counsel position in 1996, *see id.* at 31. The deposition testimony says nothing about a "word-of-mouth" system and nothing about a system that prevented, either directly or indirectly, the plaintiff for applying for the Claims Counsel position. Finally, the plaintiff relies on the deposition testimony of Robert Covington-at pages 32-33, Attached to the Affidavit of Ann Yonker at Exhibit B. That portion of Mr. Convington's deposition testimony says absolutely nothing about Chubb's system for filling open positions generally or Mr. Covington's own experience in applying for particular positions within the company. The Court will assume that the citation was made in error and was not an intentional mis-characterization of Mr. Covington's testimony.

The Court concludes that the plaintiff has failed to come forward with any evidence that she applied for the three open positions that were filled by Mary Elliot in June 1996, by Aaron Goldstein in December 1997, and by James Sharkey in February 1997. Thus, the plaintiff has not made out a *prima facie* case of discriminatory failure to promote and the defendants' motion for summary judgment on the plaintiff's failure to promote claims must be granted.

ii. Wrongful termination.

As noted above, on her wrongful termination claim the plaintiff must come forward with evidence showing: i) that the plaintiff was a member of a protected class; ii) that she was qualified for the position of Zonal Claims Examiner; and iii) that she was terminated despite her qualifications.

The defendants argue that the plaintiff cannot meet her *prima facie* burden because the plaintiff was not performing her job at a level necessary to meet her employer's legitimate expectations. The plaintiff argues that she was qualified for the position in light of her prior litigation experience in private practice, the training she received at Chubb, her performance evaluations and her handling of her cases while employed at Chubb, among other things. *See, e.g.*, Plaintiff's Rule 56.1 Statement at PP 4-5, 9-12. While there appears to be significant doubt as to whether a fact finder could reasonably conclude that the plaintiff was performing at the level necessary maintain her position of Claims Examiner in light of the deficiencies in plaintiff's performance noted throughout 1996 and 1997, *see* Defendants' Rule 56.1 Statement at PP 50, 53-56, 59-67, 71, 88-91, 94, 111, 113-114, 121, 123, 128, 131-39, the Court must be careful not to impose too high a burden on a plaintiff when analyzing her *prima facie* case; rather, issues concerning her qualifications should be addressed in the second and third steps of the burden shifting analysis. *See Ezold, 983 F.2d at 523* (citations omitted).

Accordingly, the Court concludes that the plaintiff has raised at least a minimal question of material fact as to whether she was qualified to remain in the position of Claims Examiner despite the performance deficiencies noted above.

b) Defendants' non-discriminatory reasons for their actions.

If a plaintiff proves a *prima facie* case of discrimination, the burden of production shifts to the defendants to come forward with evidence of a non-discriminatory reason or reasons for their decisions.

i. Failure to promote claim. n2

The decision to promote Mary Elliot to the position of Claims Counsel was made by Edward Spell. *See* Declaration of Edward G. Spell ("Spell Decl.") at P 2. In April 1995, Spell interviewed several Chubb employees for the newly-created position of Claims Counsel in the Corporate Liability Unit of Chubb, of which Spell was the only employee. *See id.* at P 10. All four employees expressed to Spell an interest in the position. *See id.* at P 12. According to Spell, the vacancy in that position was "well known" within the company. *See id* at P 10. Among the employees Spell interviewed were Lynn Stollsteimer and Mary Elliot. *See id.* Although Spell was "very impressed" with Elliot's credentials and experience, he ultimately selected Lynn Stollsteimer for the position. *See id.* at P 15. In April 1996, Lynn Stollsteimer left the position under Spell when she was promoted to a new position. *See id.* at P 16. Spell states that, in light of his prior experience with Elliot, he immediately sought her to fill the position vacated by Stollsteimer, and Elliot was offered and accepted the position. *See id.* at P 17. Among the factors that influenced Spell's decision to hire Elliot were i) her experience in the insurance industry; ii) her specific experience with "bad faith" claims; iii) her prior claims handling experience; iv) her prior performance evaluations; and v) Spell's personal familiarity with Elliot's performance from working with Elliot on a seminar. *See id.* at P 14.

With respect to the December 1996 promotion of Aaron Goldstein and the February 1997 promotion of James Sharkey, the defendant has come forward with evidence that the plaintiff was not considered for those positions because of the deficiencies she had incurred in her current position as Claims Examiner. *See* Declaration of Susan Gaffney at P 26. According to Gaffney, the plaintiff was advised in September 1996 that she would not be considered for any promotions until she could demonstrate competency in her current position. *See id.* at P 26. Plaintiff never addressed the noted deficiencies and her performance never improved. *See id.* at P 49.

The Court concludes that the defendants have come forward with evidence of non-discriminatory reasons for their decisions to promote Mary Elliot in June 1996 to the position of Claims Counsel, to promote Aaron Goldstein to Specialty Claims Manager in December 1996 and to promote James Sharkey to D&O Supervisor in February 1997.

ii. Wrongful termination claim.

With respect to the plaintiff's discharge, the defendants' have come forward with evidence that the decision to terminate the plaintiff's employment was made after certain deficiencies in the plaintiff's performance were noted and discussed with the plaintiff and after the plaintiff failed to cure those deficiencies. *See* Defendants' Rule 56.1 Statement at PP 50, 53-56, 59-67, 71, 88-91, 94, 111, 113-114, 121, 123, 128, 131-39. According to the defendants, the plaintiff was not functioning at a competency level sufficient for her to continue her employment at Chubb as a Claims Examiner.

Accordingly, the Court concludes that the defendants have come forward with significant reasons for her termination unrelated to the plaintiff's race, gender or age.

c) Plaintiff's evidence of pretext.

Because the defendants have met their burden of coming forward with non-discriminatory reasons for their decisions, the inference of discrimination drops from the case and the burden of production now shifts back to the plaintiff to come forward with evidence that the defendants' proffered reasons are a mere pretext to mask their discriminatory intent. The plaintiff can meet her burden either by coming forward with evidence that casts doubt on the defendants' proffered reasons, or by coming forward with evidence that discrimination was more likely than not the real reason for the defendants' adverse employment decisions. *See Fuentes, 32 F.3d at 764* (citation omitted).

i. Failure to promote.

Even if the plaintiff had come forward with evidence that she applied or the three promotions that were filled by Elliot in June 1996, Goldstein in December 1996 and Sharkey in

February 1997, which she has not, *see* Section III.B.2.b.i., *supra*, the defendants are entitled to summary judgment on the plaintiff's failure to promote claims because the plaintiff has failed to come forward with evidence that the defendants' proffered non-discriminatory reasons for their actions were a mere pretext for discrimination.

To show pretext, the plaintiff need not come forward with explicit evidence of discrimination. *See Ezold, 983 F.2d at 523* (citation omitted). Rather, the plaintiff may satisfy her burden either by coming forward with evidence that a discriminatory reason more likely motivated the employer, or by coming forward with evidence showing that the employer's stated reasons for their decisions are unworthy of credence. *See id.* Absent evidence casting doubt on the employer's proffered reasons, the Court will not substitute its judgment for the employer's business judgment when making decisions regarding which employees to promote. *See id. at 527.*

Where an employer produces evidence that the plaintiff was not promoted because of its view that the plaintiff lacked a particular qualification the employer deemed essential to the position sought, a district court should focus on the qualification the employer found lacking in determining whether non-members of the protected class were treated more favorably.

Id. at 528.

Thus, in cases where, as here, the defendants' proffered non-discriminatory reason for the failure to promote the plaintiff is that the plaintiff "lacked a particular qualification the employer deemed essential to the position sought," the Court must focus its inquiry on the existence, or lack, of the qualification in the employees who the employer ultimately promoted.

Here, in sum, the areas where the plaintiff was lacking, according to the defendants, were her failure to set reserves within 90 days of a notice of claim, *see* Defendants' Rule 56.1 Statement at PP 53, 56, 62, 63, 64, 91, 128 and 131, failure to

document the status of her cases on the computerized workstation, *see id.* at PP 50, 60, 71, 89, 128, 131 and 132, and the failure to write coverage letters to insureds within 30 days of a notice of claim, *see id.* at PP 128 and 131. The plaintiff has not come forward with any evidence demonstrating that either Ellis or Goldstein or Sharkey had performance problems even approaching the plaintiff's documented problems in those particular areas. In her Rule 56.1 Statement, the plaintiff makes a fleeting reference to Mr. Sharkey's performance review and claims, without any evidentiary support, that the plaintiff's "performance was criticized more harshly than others who were similarly situated." Plaintiff's Rule 56.1 Statement at P 62. The plaintiff cites to Exhibit O of the Yonker Affidavit as support for this statement. That document appears to be a portion of a performance evaluation of an employee named "Jim," who presumably is James Sharkey. The document contains only pages 4, 5, 8 and 10, and then another page 8 of what appears to be a different document. Additionally, there is no indication as to what time period the document is purported to cover. In any event, whatever that document is, the relevant portions of Exhibit 0 of the Yonker Affidavit state that Sharkey "generally prepares D&O memos on applicable files and includes factual recitation, detailed analysis of coverage, liability, damages and reserves." Additionally, the document generally states that Mr. Sharkey timely and thoroughly documents his cases and "Exceeds Some" of all of his goals in selected categories. In short, the document does not show that Sharkey had similar performance deficiencies as the plaintiff and, thus, is not relevant to showing pretext under *Ezold*. Moreover, the plaintiff has not come forward with any evidence whatsoever that shows that either Elliot's, Goldstein's or Sharkey's deficiencies in the relevant categories were "overlooked for no apparent reason." *See Ezold, 983 F.2d at 531.* In comparing herself to the promoted employees, all the plaintiff has shown is that they, in some cases, are outside of her protected class and that she received satisfactory-performance evaluations in some reviews. That showing, as a matter of law, is insufficient to show pretext under *Ezold*.

Plaintiff's remaining arguments on pretext are without merit and require little discussion. A plaintiff, in a failure to promote case, can also show pretext by proving that she was discriminated against in the past by her employer, or by showing that her employer had a discriminatory policy and practice with regard to minority employment as evidenced by statistics. *See Ezold, 983 F.2d at 539-40* (citations omitted). The plaintiff argues that she was denied training and an opportunity to succeed at Chubb from the beginning of employment with the company. The plaintiff's argument, however, is wholly unsupported by the evidence of record–either affidavit testimony, deposition testimony, answers to interrogatories, admissions or documents produced in this action. On a motion for summary judgment, a plaintiff cannot sit back and rely on the allegations of her pleadings but, rather, must come forward with evidence showing a genuine issue for trial. *See* Fed. R. Civ. P. 56(e). Typical of the plaintiff's unsupported arguments is the following: "At a highly structured and bureaucratic company like Chubb, once the CEO or other managers classify you as a loser, you are tainted." Plaintiff's Opposition at 4. The plaintiff, however, has come forward with no evidence whatsoever first, that Chubb is "highly structured or bureaucratic," or that the Chief Executive Officer had any opinion of the plaintiff or even knew who she was, or that anyone at the company regarded the plaintiff as a "loser," or, if these unnamed managers did regard the plaintiff as a loser, that this opinion was based on her race, gender or age. Similarly, the plaintiff repeatedly states in her brief that Jeff King, the plaintiff's supervisor in October 1989, was a "well-known racist" who "marginalized" her work and "tainted" her employment at Chubb. Even if true, the plaintiff's allegations with respect to Mr. King are irrelevant to showing pretext because the plaintiff has not come forward with evidence that Mr. King influenced, either directly or indirectly, the decisions in 1996 and 1997 to promote Elliot, Goldstein and Sharkey. For the same reason, the plaintiff's allegations with respect to King's treatment of other African-American employees, Wanda Akin and Robert Covington, are not relevant to showing pretext. Additionally, the plaintiff's allegations with respect to Chubb's

mistreatment of Ulric McNichol and the other African-American employees are irrelevant to showing pretext because these individual instances of "marginalization" and being "set up to fail", even if proven true, do not show a company wide policy or practice of discrimination. Moreover, the plaintiff's allegations that Jeff King was said to have told racist jokes on two occasions, *see* Plaintiff's Rule 56.1 Statement at P 29, neither of which were actually observed by the plaintiff, is irrelevant to a showing of pretext because the plaintiff has failed to come forward with any evidence whatsoever showing that the racist jokes were in any way linked to the allegedly adverse employment decisions. Similarly, the plaintiff's allegations about Gaffney's allegedly racist "mimicking" of an "Amos and Andy routine," *see id.* at P 66, is irrelevant to showing pretext because the plaintiff has failed to come forward with evidence showing any connection whatsoever between the allegedly racist comments to the decision making process with respect to the plaintiff's employment.

Accordingly, the Court concludes that the plaintiff has failed meet her burden of coming forward with evidence showing that the defendant' proffered non-discriminatory reasons for the promotion of Mary Elliot in June 1996, Aaron Goldstein in December 1996 and James Sharkey in February 1997 are a mere pretext for discrimination. The plaintiff has not come forward with sufficient evidence that would enable a finder of fact to conclude that the defendants' proffered reasons are not worthy of belief, or evidence that invidious discrimination more likely than not was the real reason for the adverse employment decisions. Thus, the defendants' motion for summary judgment on the plaintiff's failure to promote claims must be granted for the additional reason that the plaintiff has not shown pretext.

ii. Wrongful termination claim.

Plaintiff has similarly failed in coming forward with facts showing that the defendants' non-discriminatory reasons for the termination of her employment was a pretext for discrimination. As discussed extensively above, for over one year prior to her discharge, the plaintiff had specific

performance deficiencies in particular areas which she failed to correct. The plaintiff's opposition brief states that she relies "on the same evidence identified in [her failure to promote argument] in Point I, showing that the defendants' articulated reasons for denying Ms. Jackson the position of Corporate Liability Examiner, are pretextual, Ms. Jackson also relies but will not restate at length herein this same evidence [showing pretext]." Plaintiff's Opposition at 42-43. The portion of the plaintiff's brief directed at her wrongful discharge claim does not contain a single citation or reference to any evidence whatsoever. Thus, for the reasons discussed in Section III.B.c.i., *supra*, the Court concludes that the plaintiff has not come forward with any evidence showing that the defendants' proffered non-discriminatory reasons for the termination of her employment were a mere pretext for discrimination. The plaintiff has not come forward with sufficient evidence that would enable a finder of fact to conclude that the defendants' proffered reasons are not worthy of belief, or evidence that invidious discrimination more likely than not was the real reason for the adverse employment decisions.

3. *Plaintiff's Retaliation Claim*

The defendants also move for summary judgment on the plaintiff's claims for retaliation. The plaintiff alleges-generally that the defendants retaliated against her after she complained of discriminatory treatment.

Title VII and LAD both prohibit an employer from taking retaliatory action against an employee for complaining that the employer has violated that antidiscrimination statute. *See 42 U.S.C. § 2000e-3*(a) (Title VII); N.J. Stat. Ann. § 10:5-12(d) (LAD). The shifting burdens of proof of *McDonnell Douglas* apply to retaliation claims. *See Griffiths v. CIGNA Corp., 988 F.2d 457, 468* (3d Cir.), *cert. denied, 510 U.S. 865, 126 L. Ed. 2d 145, 114 S. Ct. 186 (1993); Cuffy v. Texaco Refining & Marketing Co., 684 F. Supp. 87, 94 (D. Del. 1988).*

To establish a prima facie case of retaliation, plaintiff must prove: i) that she was engaged in a protected activity, ii) that she suffered an adverse employment decision, and, iii)

that there was a causal connection between the protected activity and the adverse employment decision. *See Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir.1995); Charlton v. Paramus Bd. of Ed., 25 F.3d 194, 196-97* (3d Cir.), *cert. denied, 513 U.S. 1022, 130 L. Ed. 2d 503, 115 S. Ct. 590 (1994); Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 198 (3d Cir. 1996)* (citations omitted) (applying three-part analysis to retaliation claims brought under NJLAD).

As for the evidence supporting her *prima facie* case of retaliation, the plaintiff states in her brief that "Ms. Jackson alleges in Counts I through V [of the Third Amended Complaint] that Defendants subjected her to unlawful employment actions for reporting illegal conduct under LAD, ADEA, Title VII, and ERISA. She also alleges that the defendants subjected her to retaliatory actions which violate laws, regulations and public policies for asserting her statutory and constitutional rights." Plaintiff's Opposition at 46. There are no citations or references to any evidence of record contained anywhere in the portion of the plaintiff's opposition brief directed at the defendants' retaliation argument. As noted above, Rule 56(e) expressly provides that a party resisting summary judgment may not rest on her pleading but, rather, must come forward with evidence demonstrating a genuine issue for trial. Here, the plaintiff merely recites the allegations contained in the Third Amendment Complaint as if this were a motion to dismiss under Rule 12(b)(6) ignoring the applicable standard. Moreover, the plaintiff has provided the Court with absolutely no evidence of i) when the plaintiff engaged in protected activity; ii) what specific protected activity or activities the plaintiff undertook; or iii) evidence showing a genuine issue for trial on a causal connection between her protected activity and adverse employment decisions. Mere temporal proximity to a protected activity, alone, is insufficient as a matter of law, but may have evidentiary significance in certain instances. *See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000)* (citing *Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997))*. Here, the plaintiff, at most, has alleged temporal

proximity between the alleged protected activity and the adverse employment decisions.

Moreover, even if the plaintiff had satisfied her *prima facie* burden on her retaliation claim, for the reasons discussed in Section III.B.c.i., *supra*, the plaintiff has not come forward with evidence showing that the defendants' proffered reasons for their decisions were a pretext for retaliation.

Accordingly, the defendants' motion for summary judgment on the plaintiff's retaliation claim must be granted.

4. *Plaintiff's Claims Against Kristiansen and King*

The defendants argue that even if the plaintiff's failure to promote and wrongful termination claims asserted under NJLAD and NYHRL survive, the plaintiff's claims asserted against Jeff King and Brian Kristiansen must be dismissed because those individual defendants had no involvement in the 1996 and 1997 decisions on promotions and termination. The plaintiff argues in opposition that these supervisors somehow "sowed the seeds of discriminatory treatment" that years later apparently germinated into the denial of promotions and, ultimately, the plaintiff's termination. *See* Plaintiff's Opposition at 48-49. The plaintiff further argues, without reference to any facts in the record, that King and Kristiansen "contributed to the discriminatory animus that attached to Ms. Jackson's performance reviews and the decision to marginalize her and terminate her employment." *See id.* at 49. The plaintiff urges the Court not to "reward" these defendants by granting them summary judgment. *See id.*

Unlike Title VII or the ADEA, LAD expressly provides for the imposition of liability on individuals who violate its provisions. *See* N.J. Stat. Ann. § 10:5-12(a). The law proscribes a broad range of discrimination by employers, *see* N.J. Stat. Ann. § 10:5-12(a), and defines employers as "persons . . . [including] one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in

bankruptcy, receivers and fiduciaries." *See* N.J. Stat. Ann. § § 10:5-5(a) and 10:5-5(e).

The New Jersey Law Against Discrimination, however, also imposes liability on individuals who aid or abet one who violates the law. *See Failla v. City of Passaic, 146 F.3d 149, 158-59 (3d Cir. 1998).* The law forbids any "person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or attempt to do so." N.J. Stat. Ann. § 10:5-12(e). Employers and individual supervisors can be held liable under the law for aiding and abetting another's discriminatory conduct. *See Hurley v. Atlantic City Police Dept., 174 F.3d 95 at 126.*

Similarly, individual liability does not attach under the NYHRL unless either i) the individual defendant had an ownership interest in the entity that allegedly discriminated against the plaintiff; or ii) the individual participated in the discriminatory conduct as an aider or abetter. *See Mills v. George R. Funaro & Co., 2001 U.S. Dist. LEXIS 396, No. 99 Civ. 4816, 2001 WL 50893,* * 8 (S.D.N.Y. Jan. 19, 2001) (citations omitted).

The Court must look to the Restatement (Second) of Torts when applying the aiding and abetting portion of the New Jersey Law Against Discrimination. *See Failla, 146 F.3d at 158.* The Restatement (Second) of Torts § 876(b) "provides that a person is liable for harm resulting to a third person from the conduct of another when he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Hurley, 174 F.3d at 126* (quoting *Failla, 146 F.3d at 158* (quoting Restatement (Second) of Torts § 876(b)) (internal quotations omitted). The plaintiff can hold the individual defendants liable for aiding or abetting another's discriminatory conduct if the plaintiff can show that the individual defendants' inaction rose to the level of rendering "substantial assistance or encouragement." *See Hurley, 174 F.3d at 128* (quoting *Failla, 146 F.3d at 158, n. 11).*

Here, even if the plaintiffs' failure to promote and wrongful termination claims survived summary judgment, the plaintiff's claims against King and Kristiansen must be dismissed because the plaintiff has not come forward with any evidence whatsoever showing that these individual defendants knew about the decisions to promote Elliot, Goldstein and Sharkey, or evidence showing that the individual defendants knew about the decision to terminate the plaintiff's employment with Chubb. Nor has the plaintiff come forward with facts showing that the individual defendants gave substantial assistance or encouragement to the decisionmakers who made the adverse employment decisions with respect to the plaintiff's employment with Chubb.

Accordingly, even if the plaintiff's failure to promote and wrongful termination claims had survived summary judgment, the Court concludes that the defendants' motion for summary judgment on the plaintiff's claims asserted against the individual defendants must be granted.

5. *Plaintiff's ERISA Claim*

Finally, the defendants move for summary judgment on the plaintiff's ERISA claim on the grounds that the plaintiff cannot show that the defendants intended to deprive her of rights and benefits protected by ERISA.

Section 510 of ERISA, provides, in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . ..

29 U.S.C. § 1140. ERISA further provides for a private right of action for plan beneficiaries who are denied benefits in violation of § 510. *See 29 U.S.C. § 1132.*

To establish a *prima facie* case of a § 510 violation, the plaintiff must Come forward with facts showing prohibited employer conduct taken for the purpose of interfering with rights or benefits protected by ERISA. *See Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997)* (citation omitted). The plaintiff need not prove that the employer's sole reason for her termination was the denial of protected ERISA benefits, but the plaintiff nonetheless must show that the employer acted with the specific intent to violate ERISA. *See id.* (citation omitted). "Incidental loss of benefits as a result of a termination will not constitute a violation of section 510." *Id.* (citations omitted).

Here, the plaintiff argues, without reference to any specific facts, that "because of conflicting testimony on the reasons for [the plaintiff's] termination and the proximity of her vesting date and termination date, could further lead a jury to determine that she was terminated so that her pension would not vest." Plaintiff's Opposition at 50. The plaintiff's allusion to some metaphysical "conflict" in the testimony with respect to the plaintiff's ERISA claim does not create a genuine issue for trial on that claim. The plaintiff has come forward with absolutely no evidence whatsoever that the defendants' acted with the specific intent to deny her rights and benefits protected under ERISA.

Accordingly, the defendants' motion for summary judgment on the plaintiff's ERISA claim must be granted.

IV. CONCLUSION

For the reasons discussed above, the plaintiff's motion for reargument of the Court's September 1, 2000 and December 5, 2000 decisions is denied, the defendants' conditional cross-motion for summary judgment is dismissed as moot, and the defendants' motion for summary judgment is granted in its entirety. An appropriate form of order is filed herewith.

GARRETT E. BROWN, JR., U.S.D.J.

ORDER - ENTERED on THE DOCKET 3-22-01

This matter having come before the Court upon the motion of the plaintiff, Marie N. Jackson, for reargument of the Court's Memorandum Opinion and Order entered on September 5, 2000, which granted in part the defendants' partial motion to dismiss, and reargument of the Court's Memorandum Opinion and Order entered on December 5, 2000, which affirmed an order entered by the Honorable Freda L. Wolfson, U.S.M.J.; and upon the conditional cross-motion of the defendants' for partial summary judgment; and upon the motion of the defendants for summary judgment on the plaintiff's remaining claims; and for the reasons stated in the Memorandum Opinion filed herewith; and the Court having considered the submissions of the parties and the arguments of counsel; and for the reasons stated in the Memorandum Opinion filed herewith;

IT IS this 21St day of MARCH, 2001;

ORDERED that the plaintiff's motion for reargument is DENIED; and it is further

ORDERED that the defendants' conditional cross-motion for summary judgment is DISMISSED AS MOOT; and it is further

ORDERED that the defendants' motion for summary judgment is GRANTED; and it is further

ORDERED that this case is closed.

GARRETT E. BROWN, JR., U.S.D.J.

Footnotes

1 The various iterations of the plaintiff's claims asserted in the amendments to the complaint are discussed more fully in the Court's Memorandum Opinion dated September 1, 2000 and will not be discussed at length here.

2 The Court will address the defendants' proffered non-discriminatory reasons for the promotions notwithstanding the plaintiff's failure to make out her *prima facie* case

because, as discussed more fully in Section III.B.2.c., *infra*, in the alternative, even if the plaintiff had satisfied her *prima facie* burden, she has failed to come forward with evidence demonstrating that the defendants' proffered reasons were a pretext for discrimination.

No. 01-2133

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARIE N. JACKSON,
Appellant

v.

CHUBB CORPORATION; CHUBB & SON, INC.; FEDERAL INSURANCE COMPANY; PAT HURLEY; MICHAEL MARINARO; GEORGE FAY; DORIS JOHNSON; MALCOLM BURTON; JEFF KING; KIM HOGREFE; BRIAN KIRSTIANSEN; SUSAN GAFFNEY; ED ELLIS; JIM GARDNER; JOHN DEGNAN; ED SPELL; SYLVESTER GREEN; RON GOLDSTEIN; AARON GOLDSTEIN

June 5, 2002, Submitted Under Third Circuit LAR 34.1(a)

June 7, 2002, Filed

COUNSEL:
For MARIE N. JACKSON, Appellant: Linda Wong, Daniel C. Fleming, James K. Haney, Wong & Fleming, Princeton, NJ.

For CHUBB CORP, Appellee: Robert M. Vinci, Drinker, Biddle & Shanley, Florham Park, NJ.

For CHUBB & SON, INC, FED INS CO, PAT HURLEY, MICHAEL MARINARO, GEORGE FAY, DORIS JOHNSON, MALCOLM BURTON, JEFF KING, KIM HOGREFE, BRIAN KIRSTIANSEN, SUSAN GAFFNEY, ED ELLIS, JIM GARDNER, JOHN DEGNAN, ED SPELL, SYLVESTER GREEN, RON GOLDSTEIN, AARON GOLDSTEIN, Appellees: Christine A. Amalfe, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ. John A. Ridley, Drinker, Biddle & Shanley, Florham Park, NJ.

JUDGES:
Before: SCIRICA, BARRY, and WEIS, Circuit Judges.

OPINION BY:
Maryanne Trump Barry

OPINION:

OPINION OF THE COURT

BARRY, Circuit Judge

On September 15, 1998, Marie Jackson filed suit against Chubb Corporation, Chubb & Son, Inc., a division of Federal Insurance Company, and 16 individual employees, alleging race, gender, and age discrimination in the workplace. After a series of motions and rulings thereon by the District Court, the defendants ultimately prevailed. Jackson appeals, challenging: (1) an order filed on August 16, 1999 that dismissed the Chubb Corporation as a named defendant; (2) the portion of an order filed on September 5, 2000 that dismissed Jackson's NJLAD claims on statute of limitations grounds; (3) an order filed on December 5, 2000 that affirmed the order of the Magistrate Judge denying Jackson's motions for additional discovery; and (4) the portion of an order filed on March 21, 2001 that, following the Court's lengthy and altogether thorough opinion, granted summary judgment in favor of the defendants on her remaining NJLAD claims. After careful consideration, we conclude that Jackson's claims are wholly unavailing and we will affirm the District Court. We have jurisdiction to hear this appeal under *28 U.S.C. § 1291*. Because the parties are familiar with the facts, we need not recite them here.

Jackson first argues that the District Court erroneously dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), all but a few of her NJLAD claims on statute of limitation grounds. She asserts that a six-year and not a two-year statute of limitations applies to all of the dismissed claims. The Supreme Court of New Jersey has clearly held, however, that a two-year statute of limitations applies to all claims under the NJLAD in which the "operative facts" arose after July 27,

1993. *Montells v. Haynes, 133 N.J. 282, 298, 627 A.2d 654 (1993).* We agree with the District Court that all of the "operative facts arose in and after 1994 and, therefore, the two-year statute of limitations applies" to Jackson's dismissed claims. App. at 48. In the alternative, Jackson argues that the statute of limitations should have been tolled because "no single specific event in [a] continuous pattern of violations placed [her] on notice." Appellant's Br. at 22. Because Jackson's claims arose from discrete employment actions, and because it is clear from Jackson's complaint that she believed that she was being discriminated against at the time of these actions, we find that the continuing violation theory does not apply here. *Bolinger v. Bell Atlantic, 330 N.J. Super. 300, 308-09, 749 A.2d 857 (App. Div. 2000);* accord *Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 483 (3d Cir. 1997); Bullington v. United States Airlines, Inc., 186 F.3d 1301, 1311 (10th Cir. 1999).*

Jackson next argues that the District Court erred in granting summary judgment for the defendants on her remaining NJLAD claims. The burden-shifting framework adopted for Title VII cases as originally set forth in *McDonnell Douglas v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973),* is the same framework utilized in *NJLAD cases. Peper v. Princeton Univ. Bd. Of Trustees, 77 N.J. 55, 82, 389 A.2d 465 (1981).* Where an employee has established a prima facie case of discrimination, the employer must articulate a legitimate, non-discriminatory reason for the employment action, after which the burden shifts back to the employee to show pretext. *St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596, 538 A.2d 794 (1988).* Assuming, without deciding, that Jackson established a prima facie case, and that the defendants articulated non-discriminatory reasons for their actions, we find that Jackson failed to show pretext and, accordingly, her claim fails.

Jackson also argues that the District Court erred when it affirmed the Magistrate Judge's denial of her motions seeking additional discovery. Jackson failed, however, to appeal the order of the Magistrate Judge in a timely manner. Federal

Rule of Civil Procedure Rule 72(a) states, in relevant part, that "within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order." Jackson filed an objection seven days after the deadline and never moved for an extension pursuant to Federal Rule of Civil Procedure 6. Consequently, she waived her right to claim error as to this issue.

Finally, Jackson argues that the District Court erred when it dismissed the Chubb Corporation as a defendant. The District Court found that the Chubb Corporation was not a proper party to the suit because it was a separate and distinct entity from its subsidiary, Chubb & Son, Inc., which was Jackson's actual employer. The Court also found that there were no grounds for allowing Jackson to pierce the corporate veil as to the Chubb Corporation. Because we have found that the subsidiary, Chubb & Son, Inc., is not liable, it follows that its parent company, Chubb Corporation, cannot be held liable. Thus, this claim is moot.

We will affirm the orders of the District Court.

/s/ Maryanne Trump Barry

Circuit Judge